DOCKET

SUPREME COURT
OF THE UNITED STATES

No. 10-1320
Title: Alex Blueford, Petitioner
v.
Arkansas
Docketed: April 27, 2011
Lower Ct: Supreme Court of Arkansas
Case Nos.: (CR 10-554)
Decision Date: January 20, 2011
Rehearing Denied: February 24, 2011
Questions Presented

~~Date~~~	~~~~~~~~Proceedings and Orders~~~~~~~~~~~~~~~~~~~~~~
Apr 25 2011	Petition for a writ of certiorari filed. (Response due May 27, 2011)
May 2 2011	Waiver of right of respondent Arkansas to respond filed.
May 17 2011	DISTRIBUTED for Conference of June 2, 2011.
May 23 2011	Response Requested . (Due June 22, 2011)
May 25 2011	Brief amicus curiae of Constitutional Accountabiity Center filed.
Jun 3 2011	Brief amicus curiae of National Association of Criminal Defense Lawyers filed.
Jun 21 2011	Brief amici curiae of Criminal Law Professors filed.
Jun 22 2011	Brief of respondent Arkansas in opposition filed.
Jun 27 2011	Reply of petitioner Alex Blueford filed.
Jun 29 2011	DISTRIBUTED for Conference of September 26, 2011.
Oct 3 2011	DISTRIBUTED for Conference of October 7, 2011.
Oct 11 2011	Petition GRANTED.
Nov 25 2011	Joint appendix filed. (Statement of costs filed)
Nov 25 2011	Brief of petitioner Alex Blueford filed.
Dec 2 2011	Brief amicus curiae of Constitutional Accountabiity Center filed.
Dec 2 2011	Brief amici curiae of Criminal Law Professors filed.
Dec 2 2011	Brief amicus curiae of National Association of Criminal Defense Lawyers filed.
Dec 19 2011	SET FOR ARGUMENT ON Wednesday, February 22, 2012.
Dec 21 2011	The time to file respondent's brief on the merits is extended to and including January 3, 2012.
Jan 3 2012	Brief of respondent Arkansas filed.
Jan 5 2012	Arkansas Supreme Court Record received (Electronic)
Jan 6 2012	Record from Supreme Court of Arkansas is electronic.
Jan 10 2012	Brief amici curiae of Michigan, et al. filed.

Jan 12 2012	CIRCULATED
Jan 17 2012	Motion of Michigan, et al. for leave to participate in oral argument as amici curiae and for divided argument filed.
Jan 25 2012	Reply of petitioner Alex Blueford filed. (Distributed)
Feb 17 2012	Motion of Michigan, et al. for leave to participate in oral argument as amicus curiae and for divided argument DENIED.
Feb 22 2012	Argued. For petitioner: Clifford M. Sloan, Washington, D. C. For respondent: Dustin McDaniel, Attorney General, Little Rock, Ark.
May 24 2012	Adjudged to be AFFIRMED. Roberts, C. J., delivered the opinion of the Court, in which Scalia, Kennedy, Thomas, Breyer, and Alito, JJ., joined. Sotomayor, J., filed a dissenting opinion, in which Ginsburg and Kagan, JJ., joined.

PETITION FOR WRIT OF CERTIORARI

Supreme Court U.S.
FILED
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OFFICE OF THE CLERK

No. 10-___

In the Supreme Court of the United States

ALEX BLUEFORD,
Petitioner,

v.

STATE OF ARKANSAS,
Respondent.

On Petition for a Writ of Certiorari to the Arkansas Supreme Court

PETITION FOR A WRIT OF CERTIORARI

WILLIAM R. SIMPSON, JR.
SHARON KIEL
CLINT MILLER
SIXTH JUDICIAL DISTRICT (ARKANSAS) PUBLIC DEFENDERS OFFICE
201 S. Broadway, Ste. 210
Little Rock, AR 72201
(501) 340-6120

CLIFFORD M. SLOAN
Counsel of Record
GEOFFREY M. WYATT
DAVID W. FOSTER
SKADDEN, ARPS, SLATE, MEAGHER & FLOM LLP
1440 New York Ave., N.W.
Washington, DC 20005
(202) 371-7000
cliff.sloan@skadden.com

Question Presented

Whether, if a jury deadlocks on a lesser-included offense, the Double Jeopardy Clause bars reprosecution of a greater offense after a jury announces that it has voted against guilt on the greater offense.

Table of Contents

Page

Question Presented i

Table of Authorities iv

Petition For A Writ Of Certiorari 1

Opinions Below 1

Jurisdiction 1

Constitutional Provisions Involved 1

Introduction And Statement Of The Case 2

Reasons For Granting The Writ 12

I. State Courts Are Divided Over Whether The Double Jeopardy Clause Prevents Retrial On A Greater Offense When A Jury Deadlocks On A Lesser-Included Offense 13

II. The Court Should Grant Review To Clarify That The Double Jeopardy Clause Does Not Permit Retrial On A Greater Offense Simply Because A Jury Has Deadlocked On A Lesser-Included Offense 18

Conclusion 22

Appendix 1a

A. Arkansas Supreme Court Opinion 1a

B. Circuit Court Order 15a

C. Arkansas Supreme Court Order Denying Rehearing 17a

D. Excerpt of Trial Transcript of August 20, 2009 ..... 18a

Table of Authorities

Cases

Abney v. United States,
431 U.S. 651 (1977) 18

Allen v. United States,
164 U.S. 492 (1896) 7

Benton v. Maryland,
395 U.S. 784 (1969) 18

Bullington v. Missouri,
451 U.S. 430 (1981) 1

Commonwealth v. Roth,
776 N.E.2d 437 (Mass. 2002) 14, 16, 17, 19

Green v. United States,
355 U.S. 184 (1957) 18, 19, 20

People v. Hall,
324 N.E.2d 50 (Ill. App. Ct. 1975) 14

People v. Hickey,
303 N.W.2d 19 (Mich. Ct. App. 1981) 14

People v. Richardson,
184 P.3d 755 (Colo. 2008) 14, 16

Price v. Georgia,
398 U.S. 323 (1970) 20

State v. Bell,
322 N.W.2d 93 (Iowa 1982) 14

State v. Booker,
293 S.E.2d 78 (N.C. 1982) 14

State v. Fiedler,
118 P.3d 752 (N.M. Ct. App. 2005) 15

State v. McKay,
535 P.2d 945 (Kan. 1975) 14

State v. Pugliese,
422 A.2d 1319 (N.H. 1980) 15

State v. Tate,
773 A.2d 308 (Conn. 2001) 15, 16, 17, 20

Stone v. Superior Court,
646 P.2d 809 (Cal. 1982) 15, 19

United States v. Ball,
163 U.S. 662 (1896) 19

United States v. Perez,
9 Wheat. 579 (1824) 21

Whiteaker v. State,
808 P.2d 270
(Alaska Ct. App. 1991) 15, 17, 20

CONSTITUTIONAL AND STATUTORY PROVISIONS

U.S. Const. amend. V 1, 12

28 U.S.C. § 1257 1

PETITION FOR A WRIT OF CERTIORARI

Petitioner Alex Blueford respectfully petitions for a writ of certiorari to review the judgment of the Arkansas Supreme Court in this case.

OPINIONS BELOW

The opinion of the Arkansas Supreme Court is reported at 2011 Ark. 8. App. A, at 1a. The order of the district court is not reported. App. B, at 15a.

JURISDICTION

The Arkansas Supreme Court rejected Blueford's Double Jeopardy claim in a judgment rendered on January 20, 2011. The court denied a petition for rehearing on February 24, 2011. App. C, at 17a. This Court has jurisdiction pursuant to 28 U.S.C. § 1257(1). See, *e.g.*, *Bullington v. Missouri*, 451 U.S. 430, 437 n.8 (1981) ("Although further proceedings are to take place in state court, the judgment rejecting petitioner's double jeopardy claim is 'final' within the meaning of the jurisdictional statute, 28 U.S.C. § 1257.").

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment of the United States Constitution provides in relevant part: "No person shall . . . be subject for the same offence to be twice put in jeopardy of life or limb . . . ."

The Fourteenth Amendment of the United States Constitution provides in relevant part: "No State shall . . . deprive any person of life, liberty, or property, without due process of law . . . ."

INTRODUCTION AND STATEMENT OF THE CASE

This case presents an important and recurring question regarding the constitutional prohibition against twice being put in jeopardy for the same offense.

The state of Arkansas charged petitioner Alex Blueford with capital murder. Record, *Blueford v. State*, No. CR 10-554 (Ark. filed May 28, 2010) ("Arkansas Supreme Court Record" or "ASCR") at 1, 3.[1] The trial court instructed the jury to consider capital murder and three lesser included offenses: first-degree murder, manslaughter, and negligent homicide. *Id.* at 807. The court directed the jury that it should not consider a lesser-included offense unless it first unanimously agreed that Blueford was not guilty of a greater offense: it should consider first-degree murder only if it unanimously agreed that Blueford did not commit capital murder; it should consider manslaughter only if it unanimously agreed that he did not commit capital murder or first-degree murder; and it should consider negligent homicide only if it unanimously agreed that he did not commit capital murder, first-degree murder, or manslaughter. *Id.* at 808-10.

The jury forewoman announced in open court that the jury was "unanimous against" two charges – capital murder and first-degree murder. App. D, at 19a. She also explained that the jury deadlocked on the manslaughter charge and that, accordingly, it

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[1] Although the charge was "capital murder," this is not a death penalty case because the state waived the death penalty. ASCR at 1.

had not proceeded to decide the negligent homicide charge. *Id.* at 19a-20a.

Blueford moved the trial court to accept a partial verdict of acquittal on capital murder and first-degree murder, *id.* at 23a – a practice that five other states have held is required by the rule against Double Jeopardy. See page 15, *infra*. The trial court denied the motion and granted a mistrial. App. D, at 24a-26a.

At the initiation of the retrial on all charges, the trial court rejected Blueford's motion to dismiss the capital murder and first-degree murder charges on Double Jeopardy grounds. App. B, at 15a-16a. Blueford filed an interlocutory appeal with the Arkansas Supreme Court.

The Arkansas Supreme Court affirmed. It rejected Blueford's Double Jeopardy claim on capital murder and first-degree murder, and stated that it was "unpersuaded" by the contrary decisions of other state courts. App. A, at 13a.

1. **The trial**. The state of Arkansas accused Blueford of murdering Matthew McFadden, Jr., the 20-month-old son of Kimberly Tolbert, his live-in girlfriend. ASCR at 3, 115-19.

On the morning of November 28, 2007, Tolbert left the apartment she shared with Blueford to take a relative to a doctor's appointment. *Id.* at 121. She left Blueford in charge of McFadden, as she had often done since moving in with Blueford two months before. *Id.* at 123, 140-42. Stacy Clay – a friend of Blueford's who had allowed Blueford and then Tolbert and her son to stay in her apartment – also remained in the apartment. *Id.* at 157-59.

Approximately one hour after Tolbert's departure, at Blueford's request, Clay called 911 and urgently sought help for McFadden. *Id.* at 157-61. Medical personnel arrived and determined that McFadden was having difficulty breathing. *Id.* at 619. They rushed McFadden to the hospital, and, two days later, he died in the hospital. *Id.* at 132.

What happened between Tolbert's departure and Clay's 911 call was hotly disputed at trial. The state's theory was that Blueford viciously injured McFadden by slamming him into a pair of mattresses on the floor. *Id.* at 276. The state relied entirely on circumstantial medical evidence, and emphasized an autopsy report by a state medical examiner. *Id.* at 534. There was no evidence of any history of abuse by Blueford.

The state's principal witness was Dr. Adam Craig, a medical examiner at the Arkansas State Crime Lab, who conducted the autopsy and testified about its meaning. Dr. Craig testified that he is not board certified in anatomical pathology despite five attempts to pass the board exam. *Id.* at 281-281A, 285. He concluded that the cause of death was a "closed head injury." *Id.* at 321-23. Dr. Craig opined that the death was a homicide based on the "severity of the injuries" and the absence of any other "reasonable explanation" in the information given to him by law enforcement. *Id.* He rejected the possibility that the injury could have been caused by an accident or a fall, citing one dated medical position paper, and he admitted that he was unfamiliar with recent medical literature documenting that very possibility. *Id.* at 392-94, 404-05, 414-15, 478-79.

Blueford testified in his defense, explaining that McFadden's injuries were the result of a tragic accident. He recounted the events of that morning – admitting that he had smoked a marijuana cigarette and then a tobacco cigarette while playing with McFadden. *Id.* at 648-49. While Blueford was talking on the phone, his back to McFadden, the child grabbed the still-lit tobacco cigarette from an ashtray and climbed on Blueford. *Id.* at 649. Surprised by the heat of the cigarette near his arm, Blueford jerked reflexively, striking McFadden. *Id.* McFadden crashed into a table and fell to the floor. *Id.* at 650-51. Blueford acknowledged that he initially lied to police about what happened, explaining that he was a former convict who previously had been incarcerated and feared returning to prison. *Id.* at 645-47.

Blueford's defense was supported by two expert medical witnesses. The first was Dr. Robert Bux, the head medical examiner for El Paso County, Colorado. *Id.* at 452. Dr. Bux is board certified in anatomical, clinical, and forensic pathology. *Id.* He has worked on international matters, including service for the International War Crimes Tribunal in former Yugoslavia, and he has published in the *Journal of the American Medical Association*, among other publications. *Id.* at 454-56. Dr. Bux testified that Dr. Craig's autopsy was so poorly performed as to be useless, *id.* at 465-66, 471-72, 477, 480-81, 489-92, and suggested that, as a supervisor, he would not continue to employ an examiner who turned in an autopsy like Dr. Craig's, *id.* at 415. He also explained that the position paper on which Dr. Craig relied had long been understood to be "inaccurate and not scientifically valid," *id.* at 479. In light of the botched autopsy, Dr. Bux explained, either the

State's version of events or Blueford's could be accurate, and "[t]here's no way as a forensic pathologist I can tell you which happened." *Id.* at 482.

Dr. John Galaznik, a board-certified pediatrician with thirty years of experience at the University of Alabama, also testified on Blueford's behalf. *Id.* at 695. Like Dr. Bux, Dr. Galaznik testified that the available medical evidence was entirely consistent with Blueford's account of the accident. He explained that the last decade of research had conclusively shown that children can suffer fatal head trauma from short falls. *Id.* at 725-35. He also expressly rejected the state's theory that Blueford slammed McFadden into mattresses, emphasizing that the same scenario had been examined by the biomechanical literature, which, in his view, concluded that the mattress-slamming scenario "would not cause the injuries in this case." *Id.* at 765-66.

Blueford adamantly denied any intent to injure McFadden, but he nonetheless accepted responsibility. He testified that he wished he had "been more attentive," *id.* at 691, and his counsel asked the jury to convict him of negligent homicide, *id.* at 837-39.

2. **Jury instructions and deliberations**. The trial court instructed the jury to consider four charges: capital murder and three lesser-included offenses of first-degree murder, manslaughter, and negligent homicide. *Id.* at 807. The court also instructed the jury to consider the charges one at a time, starting with the capital-murder charge. Thus, for example, the jury was to "consider the charge of murder in the first degree" only if it had "a reasonable doubt of the defendant's guilt on the charge of capital murder." *Id.* at 808.

The state stressed this instruction repeatedly. The state told the jury in its principal closing argument that it was "important for you to understand" that "before you can consider a lesser included of capital murder, you must first, all 12, vote that this man is not guilty of capital murder before you can ever move on." *Id.* at 818; see also *id.* at 818-19 ("[L]ike I said before, you don't even get to this [first-degree murder] instruction until all 12 of you are able to vote that you do not believe this man is guilty of capital murder . . . ."). Blueford's counsel acknowledged the same instruction in her closing, suggesting that the jury could "consider all the charges" but agreeing with the state that "you must vote first on capital murder." *Id.* at 821. Apparently unsatisfied by this qualified concession, the state on rebuttal rejected the idea that the jury was free to "just lay everything out here and say, well, we have four choices. Which one does it fit the most?" *Id.* at 848. Instead, the state insisted, "unless all 12 of you agree that this man's actions were not consistent with capital murder, then and only then would you go down to murder in the first degree." *Id.*

After closing arguments, the jury retired to deliberate. *Id.* at 855. Four hours later, the trial court received a note from the jury asking "what happens if we cannot agree on a charge at all." *Id.* at 867. Upon questioning by the court, the forewoman reported that she did not believe the jury would be able to reach an agreement, and the court gave an *Allen* charge.[2] *Id.* at 867-69. The jury resumed its deliberations for half an hour. App. D, at 18a. Then it

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[2] See *Allen v. United States*, 164 U.S. 492, 501-502 (1896).

sent out another note stating that the "jury cannot agree on any one charge in this case." *Id.* The court called the jury out and addressed the forewoman. After the forewoman again stated that the jury was hopelessly deadlocked, the court asked for the jury's votes on each charge:

> THE COURT: All right. If you have your numbers together, and I don't want names, but if you have your numbers I would like to know what your count was on capital murder.
>
> JUROR NUMBER ONE: That was unanimous against that. No.
>
> THE COURT: Okay, on murder in the first degree?
>
> JUROR NUMBER ONE: That was unanimous against that.
>
> THE COURT: Okay. Manslaughter?
>
> JUROR NUMBER ONE: Nine for, three against.
>
> THE COURT: Okay. And negligent homicide?
>
> JUROR NUMBER ONE: We did not vote on that, sir.
>
> THE COURT: Did not vote on that.
>
> JUROR NUMBER ONE: No, sir. We couldn't get past the manslaughter. Were we supposed to go past that? I thought we were supposed to go one at a time.

Id. at 19a-20a.

The judge advised counsel that he thought the jury should continue deliberating. The government's

counsel said that he would defer to the court, and Blueford's counsel supported continued deliberations. In light of the jury's statement that it was deadlocked on the manslaughter charge, Blueford's counsel also requested a re-reading of the "Dynamite Charge." *Id.* at 20a. The court agreed and re-read the charge, and the jury resumed deliberations. *Id.* at 20a-22a.

While the jury was out, Blueford's counsel asked the court to accept a partial verdict of acquittal on capital murder and first-degree murder through amended jury forms, arguing that the court and the parties had "an obligation to move forward where we can." *Id.* at 23a. The state objected, contending that the verdict must be "all or nothing." The court agreed with the state and denied Blueford's request. *Id.* at 23a-24a. The state then offered to join a request for a mistrial on all charges. *Id.* at 24a. Blueford's counsel opposed, making clear that "[w]e are not asking for a mistrial at this point." *Id.* But the court again sided with the state: "the Court is going to declare one if the jury doesn't make a decision. I mean, they have been out hours and hours and hours now. And they have indicated twice that they're hopelessly deadlocked." *Id.* at 24a-25a. And when the jury returned half an hour later, still deadlocked at 10 p.m., the court immediately discharged the jury:

> THE COURT: Madam Foreman, has the jury reached a verdict?
>
> JUROR NUMBER ONE: No, it has not, sir.
>
> THE COURT: Madam Foreman, there seems to be a lot of confusion on the part of the . . . jury about some of the instructions. And because of

> the confusion and because of the timeliness and the amount of hours that has gone by without being able to reach a verdict, the Court is going to declare a mistrial.

Id. at 25a-26a.

3. **The motion to dismiss the murder charges on retrial.** The state sought to retry Blueford on capital murder and the three lesser-included offenses it had charged in the first trial. Blueford's counsel filed a motion asking the court to dismiss the capital murder and first-degree murder charges on Double Jeopardy grounds. ASCR at 87-88. The motion cited the fact that the forewoman "stated that the jury had unanimously found Defendant Blueford not guilty of capital murder and not guilty of first degree murder." *Id.* at 87; see also *id.* at 90 (noting that the jury was given "step-down" instructions that barred it from considering lesser-included offenses until it had definitively resolved the greater offenses).

The trial court denied the motion. App. B, at 15a-16a. The court wrote that it

> "finds, after review of the transcript . . . , that the jury foreperson was explicit that the jury was unanimous in voting against finding Defendant Blueford guilty of capital murder and first degree murder. However, there were no 'findings' or 'verdicts' as intended by law." *Id.*

Accordingly, the trial court denied Blueford's Double Jeopardy motion.

4. **The appeal.** Blueford took an interlocutory appeal to the Arkansas Supreme Court. The court affirmed. It first agreed with the trial court that the

forewoman's announcement of unanimous votes of not guilty on the two murder charges was not tantamount to an acquittal on those charges. App. A, at 9a-12a. Addressing the mistrial, it acknowledged that a subsequent prosecution is permitted only where the mistrial is declared as a matter of "overruling necessity." *Id.* at 8a. But it concluded that this condition was satisfied in Blueford's case because the jury had deadlocked. *Id.* at 8a-9a.

The court also held that the trial court did not err in denying Blueford's request for a partial verdict reflecting the acquittal on capital murder and first-degree murder. *Id.* at 12a-14a. It explicitly recognized that "[j]urisdictions are split on the issue of partial verdicts" and acknowledged that some states hold "that double jeopardy requires a partial verdict of acquittal as to the greater offenses if the jury is deadlocked only as to the lesser offenses." *Id.* at 12a-13a (citing decisions from Alaska, California, Connecticut, and New Hampshire). The court explained that these states have concluded that "there can be no 'manifest necessity' warranting the declaration of a mistrial where the circuit court makes no inquiry into the jury's deliberations as to the greater offenses." *Id.* at 13a. But the Arkansas Supreme Court squarely rejected these decisions: it stated that it was "simply unpersuaded by the underlying rationale" of the Double Jeopardy decisions from other states, and instead reasoned that a hung jury "'produce[s] no verdict at all.'" *Id.* at 13a-14a (quoting *Walker v. State*, 825 S.W.2d 822 (Ark. 1992)). It followed what it viewed as the "majority of jurisdictions," which "have held that if a single charge includes multiple degrees of offenses, the trial court may not conduct a partial-verdict inquiry." *Id.* at 12a.

Blueford petitioned for rehearing, and the court denied the petition. See App. C, at 17a.

This petition for a writ of certiorari timely follows.

REASONS FOR GRANTING THE WRIT

The Double Jeopardy Clause provides that "[n]o person" shall be "subject for the same offence to be twice put in jeopardy of life or limb." U.S. Const. amend. V. A jury announced in open court that it voted to acquit Alex Blueford of capital murder and first-degree murder. Permitting the state to try Blueford again on the charges of capital murder and first-degree murder will impermissibly subject him "for the same offence to be twice put in jeopardy of life or limb."

The Court should grant a writ of certiorari to resolve a recurring question of national importance, over which state courts have divided: whether the Double Jeopardy Clause prevents retrying a defendant on greater offenses if the jury has deadlocked on lesser-included offenses.

This case presents an ideal vehicle to resolve the split. Some courts previously had rationalized the existing conflict by concluding that the acceptance of acquittals on greater offenses is required only in "acquittal first" or "hard-transition" states, like Arkansas, in which the nature of the deliberations provides assurance that the jury actually reached a decision on greater-included offenses before it onsiders (and deadlocks on) lesser-included offenses. Now, however, such a rationalization is no longer possible. Unlike other acquittal-first states, Arkansas has squarely rejected the rule that Double Jeopardy prin-

ciples compel the acceptance of a jury's unanimous finding of no guilt on greater offenses. Accordingly, the split now is square, and the time for its resolution is ripe and compelling.

The Court also should grant review because the ruling of the Arkansas Supreme Court is manifestly erroneous. The Double Jeopardy Clause protects a defendant's valued right not to be tried twice on the same charges. Although a retrial after a jury deadlocks generally is permissible for those charges that the jury could not decide, there is no justification for a retrial on charges for which it is clear that the jury has unanimously voted that the defendant is not guilty. Under those circumstances, the Double Jeopardy Clause compels a court to accept a unanimous vote to acquit on the charges for which the jury has announced its unanimous determination that the defendant is not guilty (even while declaring a mistrial on the charges where the jury deadlocked or did not reach a conclusion). The Court should grant review to clarify this important area of the law, which concerns a core constitutional guarantee.

I. State Courts Are Divided Over Whether The Double Jeopardy Clause Prevents Retrial On A Greater Offense When A Jury Deadlocks On A Lesser-Included Offense.

This case presents an important federal question of constitutional significance regarding a recurring problem: in a case in which a jury deadlocks on a lesser-included, does the Double Jeopardy Clause bar a second prosecution of the greater offense? The question is particularly significant in this case because (1) the jury foreperson explicitly stated in open court, before the jury completed its deliberation, that

the jury had unanimously voted to find the defendant not guilty on two greater offenses, and (2) Arkansas law prohibits jurors from proceeding to lesser-included offenses unless they first have reached a not-guilty verdict on the greater offenses.

Appellate courts in at least thirteen states have addressed the question of the Double Jeopardy consequences of a deadlock on lesser-included offenses, with varying conclusions. Arkansas and seven other states have held that the Double Jeopardy Clause does not bar retrial of the greater offenses or require the trial court to grant a defendant's request to accept a partial verdict of acquittal. See App. A, at 12a-14a; *People v. Richardson*, 184 P.3d 755 (Colo. 2008); *State v. Booker*, 293 S.E.2d 78 (N.C. 1982); *State v. Bell*, 322 N.W.2d 93 (Iowa 1982); *People v. Hickey*, 303 N.W.2d 19 (Mich. Ct. App. 1981); *State v. McKay*, 535 P.2d 945 (Kan. 1975); *People v. Hall*, 324 N.E.2d 50 (Ill. App. Ct. 1975). These courts generally have justified their conclusions by a concern that a partial verdict is too "intrusive" – that it poses a risk either of coercing the jury to reach a verdict; or of accepting as final a verdict that was tentative or intended only as a temporary compromise; or both. See, *e.g.*, *Richardson* 184 P.2d at 763 (setting forth both concerns). Still another state high court agreed with the general principle announced in these decisions, but held that, in the case before the court, Double Jeopardy consequences attached to the greater offenses because the jury had explicitly announced that it found the defendant not guilty on greater offenses and deadlocked on the lesser-included offenses. *Commonwealth v. Roth*, 776 N.E.2d 437, 450-51 (Mass. 2002).

In contrast, appellate courts in five states have squarely held that "double jeopardy requires a partial verdict of acquittal as to the greater offenses if the jury is deadlocked only as to the lesser offenses." App. A, at 13a. See *State v. Tate*, 773 A.2d 308 (Conn. 2001); *Whiteaker v. State*, 808 P.2d 270 (Alaska Ct. App. 1991); *Stone v. Superior Court*, 646 P.2d 809, 816-17 (Cal. 1982); *State v. Pugliese*, 422 A.2d 1319 (N.H. 1980); [3] *State v. Fielder*, 118 P.3d 752 (N.M. Ct. App. 2005). These courts have recognized the "overriding importance of the prohibition against multiple prosecutions" in holding that the Double Jeopardy Clause requires a trial court to accept a partial verdict of acquittal where there is "clear and uncontradicted evidence . . . that the jury was prepared to render" such a partial verdict. *Stone*, 646 P.2d at 817. They have rejected the "intrusiveness" theory trumpeted in their sister states, reasoning that acceptance of partial verdicts on greater offenses is "logically indistinguishable" from the widely followed practice of accepting partial verdicts on offenses that are charged in separate counts. *Id.* at 819.

Despite these divergent views, three decisions over the last decade held out hope that any disagreement might be more apparent than real. In

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[3] In *Pugliese*, the New Hampshire Supreme Court, stated that it decided the case "under the constitution of New Hampshire," 422 A.2d at 729, and noted that its constitutional analysis "draw[s] upon decisions of the Supreme Court of the United States." *Id.* All of the other decisions with which the Arkansas Supreme Court disagree rely on federal Double Jeopardy precedents and principles.

Tate, the Connecticut Supreme Court noted that states like Connecticut employ an "acquittal first" or "hard transition" rule, under which a jury is "prohibited . . . from actually considering the lesser included offenses unless and until it had arrived at a unanimous verdict of acquittal on the" greater offense. 773 A.2d at 321. The "acquittal first" or "hard transition" rule thus "requires the jury to reach a partial verdict" on a greater offense before deliberating on a lesser-included offense. *Id.* For that reason, there is a compelling reason in the structure of the deliberations to infer a partial verdict of acquittal when a jury deadlocks on a lesser-included offense. In contrast, "[j]urisdictions that have adopted the 'soft transition' approach" allow the jury "to move from consideration of the greater offense to the lesser offense as a means of seeking compromise and without actually having acquitted the accused of the greater offense." *Id.* at 322. Thus, at least absent additional information, the fact of a jury deadlock on a lesser-included offense would not necessarily imply anything about its vote on greater offenses. In subsequent decisions, the Colorado Supreme Court and the Massachusetts Supreme Judicial Court similarly observed that the cases making up the split could be "distinguishable on that basis." *Richardson*, 184 P.3d at 764 n.7; *see also Roth*, 776 N.E.2d at 449 n.14.

That is no longer the case. By holding that the Double Jeopardy Clause does not require acceptance of a partial verdict even in an acquittal-first or hard-transition state, the Arkansas Supreme Court's decision in this case clarified that the long-percolating split in the lower courts now is an irreconcilable disagreement. And it did so on the clearest record

imaginable – an open-court statement by the jury forewoman that the jury had voted on, and was "unanimous against," a guilty verdict on the capital and first-degree murder charges. App. D, at 19a. The trial court in Blueford's retrial likewise explicitly found that the jury had so voted. App. B, at 15a-16a. At the same time, the Arkansas Supreme Court – apparently satisfied that the legal issues underlying the question presented had been adequately explored by the numerous other state courts that have considered it – provided little analysis to support its judgment; it merely stated that it was "simply unpersuaded" by what it saw as the "minority" view. App. A, at 13a.[4]

The Court should grant review to bring clarity to this important matter of federal constitutional rights. The split is inescapable; the underlying legal issues have been extensively explored by lower courts. The issue was squarely decided in this case on a clear re-

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[4] The Arkansas Supreme Court's suggestion that the Double Jeopardy Clause would not be violated because "no formal acquittal was entered of record," App. A, at 10a, does not diminish the split. Other "acquittal-first" or "hard-transition" states have found that Double Jeopardy barred retrial on greater offenses because of the very structure of acquittal-first deliberations (even when there was not, as here, an explicit statement by the jury that it found the defendant not guilty on greater offenses). See, *e.g.*, *Tate*, 773 A.2d at 315-16, 324; *Whiteaker*, 808 P.2d at 272-73, 279. See also *Roth*, 776 N.E.2d at 450-51 (state's argument that no jeopardy attached to jury's announcement of not-guilty finding on greater offenses because it was not in a formal jury verdict "would elevate form over substance" regarding the Double Jeopardy violation and could not be accepted).

cord, and it is outcome-determinative of the question whether Blueford will face a second trial on charges of capital murder and first-degree murder. And the issue is bound to recur – as it has repeatedly over the years – with no hope of consistent application absent this Court's intervention. For all these reasons, the Court should grant the writ.

II. The Court Should Grant Review To Clarify That The Double Jeopardy Clause Does Not Permit Retrial On A Greater Offense Simply Because A Jury Has Deadlocked On A Lesser-Included Offense.

This Court's review also is needed because the decision below erroneously sanctions a serious and harmful violation of constitutional rights, and establishes a rule of law that eviscerates a core guarantee of the Bill of Rights.

The Double Jeopardy Clause protects defendants against multiple punishments and against "being twice put to trial for the same offense." *Abney v. United States*, 431 U.S. 651, 661 (1977).[5] As this Court has explained, the "underlying idea" is that

> "the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecu-

---

[5] The protections of the Double Jeopardy Clause apply to the states through the Due Process Clause of the Fourteenth Amendment. *Benton v. Maryland*, 395 U.S. 784, 794 (1969).

> rity, as well as enhancing the possibility that even though innocent he may be found guilty." *Green v. United States*, 355 U.S. 184, 187-88 (1957).

In short, the Double Jeopardy Clause is a cornerstone of the Bill of Rights' protection of personal liberty and an important safeguard against government abuse.

On at least three grounds, the Double Jeopardy Clause bars Blueford's retrial on capital murder and first-degree murder.

First, the Double Jeopardy Clause bars retrial on the greater offenses because a jury announced in open court that it unanimously found Alex Blueford not guilty of capital murder and first-degree murder. The state of Arkansas now seeks to retry him on the very same charges. The language and purpose of the Double Jeopardy Clause require that Blueford not be retried on the charges for which he has been found not guilty. Such a retrial presents a paradigmatic violation of the Double Jeopardy Clause. Other courts faced with similar situations have readily found such a violation. See, *e.g.*, *Roth*, 776 N.E.2d at 450-51; *Stone*, 646 P.2d at 509-517. See generally *United States v. Ball*, 163 U.S. 662, 671 (1896) (the Double Jeopardy Clause bars retrial of a defendant who has been expressly acquitted by a jury of the same offense).

Second, the Double Jeopardy Clause bars retrial on the greater offenses because the structure of "acquittal-first" adjudication means that the jury voted to acquit on the greater offenses before deadlocking on a lesser-included offense. Thus, even if the jury had not explicitly announced its finding of not-guilty

on capital murder and first-degree murder, the jury's deadlock on manslaughter unequivocally established that the jury had voted to find him not guilty on the greater offenses. Here again, other courts faced with similar situations in acquittal-first jurisdictions have straightforwardly enforced the Double Jeopardy Clause and barred a retrial on the greater offense, see, *e.g.*, *Tate*, 773 A.2d at 323; *Whiteaker*, 808 P.2d at 274.

Third, even if Arkansas were not an acquittal-first or hard-transition state, the Double Jeopardy Clause would bar retrial on the greater offenses because the jury deadlocked on a lesser-included offense. Under this Court's longstanding precedent, the Double Jeopardy Clause bars retrial of greater offenses when (1) a jury convicts on a lesser-included offense, (2) the jury is silent on the greater offense, and (3) the conviction on the lesser-included offense is overturned on appeal. *Green*, 355 U.S. 184; see also *Price v. Georgia*, 398 U.S. 323 (1970) (applying *Green* and holding that Double Jeopardy Clause was violated by retrial on greater offense when jury returned conviction on lesser-included offense and was silent on greater offense, and conviction on lesser-included offense was overturned on appeal). "In substance," the Court explained in *Green*, this "situation [is] the same as though [the defendant] had been charged with these different offenses in separate but alternative counts of the indictment." 355 U.S. at 190 n.10. This is so even though the jury is silent on the greater offenses – not only because the conviction on the lower charge is "an implicit acquittal on the" greater charge, *id.* at 190, but also because the jury's silence on the greater charge does not rise to the level of manifest necessity required to justify retrial of the

greater charge, *id.* at 191. See *United States v. Perez*, 9 Wheat. 579, 580 (1824) (Story, J.) (a retrial on the same offense may proceed only if there is a "manifest necessity"). With regard to greater offenses, the situation in *Green* – conviction on a lesser-included offense and silence on a greater offense – is not distinguishable in any constitutionally significant manner from the situation when a jury deadlocks on a lesser-included offense and is silent on a greater offense. This Court's settled understanding of the Double Jeopardy Clause bars retrial of the greater offense in the former situation. It likewise should bar retrial of the greater offense in the latter situation.

In this case, of course, the jury was far from silent. The jury explicitly announced in open court that it "was unanimous against" a finding of guilt on capital murder and first-degree murder; the required structure of its deliberations also announced loudly and unmistakably that it had voted to acquit on capital murder and first-degree murder. A rule of law that allows a retrial to proceed on those acquitted charges squarely conflicts with the Double Jeopardy Clause and with decisions of other courts.

CONCLUSION

For the foregoing reasons, the Court should grant the petition for a writ of certiorari.

Respectfully submitted,

WILLIAM R. SIMPSON, JR.
SHARON KIEL
CLINT MILLER
SIXTH JUDICIAL DISTRICT (ARKANSAS) PUBLIC DEFENDERS OFFICE
201 S. Broadway, Ste. 210
Little Rock, AR 72201
(501) 340-6120

CLIFFORD M. SLOAN
Counsel of Record
GEOFFREY M. WYATT
DAVID W. FOSTER
SKADDEN, ARPS, SLATE, MEAGHER & FLOM LLP
1440 New York Ave., NW
Washington, DC 20005
(202) 371-7000
cliff.sloan@skadden.com

April 25, 2011

APPENDIX

Appendix

Table of Contents

A. Arkansas Supreme Court Opinion 1a

B. Circuit Court Order 15a

C. Arkansas Supreme Court Order Denying Rehearing 17a

D. Excerpt of Trial Transcript of August 20, 2009 ..... 18a

APPENDIX A

IN THE SUPREME COURT OF ARKANSAS

No. CR 10-554

Alex Blueford,
Appellant,

v.

State of Arkansas,
Appellee.

Appeal From The Pulaski County Circuit Court,
Fourth Division, No. CR2008-2797.

AFFIRMED

Opinion Delivered January 20, 2011

Before LANCE L. HANSHAW

DONALD L. CORBIN, Associate Justice

Appellant Alex Blueford brings this interlocutory appeal from the order of the Pulaski County Circuit Court denying his motions to prevent his retrial on a pending capital-murder charge because of double-jeopardy protections. On appeal, Blueford asserts that jeopardy attached and prevents his retrial because the jury determined during his trial that he was not guilty of capital murder and its lesser-included offense of first-degree murder. We find no error and affirm.

The record reflects that on July 15, 2008, Appellant was charged with capital murder in violation of Ark. Code Ann. § 5-10-101(a)(9)(A) (Repl. 2006) based on the State's allegation that Blueford, acting under circumstances manifesting an extreme indifference to the value of human life, caused the death of Matthew McFadden, Jr., a person fourteen years of age or younger. Appellant was initially tried in August 2009. Following the presentation of evidence, the circuit court instructed the jury on the pertinent definitions of capital murder, first-degree murder, manslaughter, and negligent homicide. The circuit court also gave the transitional instruction, AMI Crim. 2d 302, to guide the jury's transition from one offense to the next. The transitional instruction provided in relevant part that "if you have a reasonable doubt of the defendant's guilt on the charge[d offense or lesser included offense just considered], you will then consider the charge of [the next lesser included offense]."

During deliberations, the jury submitted a note to the circuit court stating that "a juror would like to know what happens if we cannot agree on a charge at all." The jury was returned to the court room and the circuit court gave an "Allen instruction," requesting that they retire for further deliberations in an attempt to reach a verdict. The jury sent out a second note indicating that they remained deadlocked. When the jurors returned to the courtroom, the following colloquy took place between the circuit court and the jury forewoman:

> THE COURT: All right, Court's back in session. Madam foreman, the Court has a note from the jury stating, (as read), "The jury cannot agree on any one charge in this case."
>
> Are you telling this Court that you're hopelessly deadlocked on every charge?
>
> JUROR NUMBER ONE: I'm not sure I understand what you mean, sir. To consider –
>
> THE COURT: Well, you're obviously in your agreement – any – any charge, conviction of any charge, or even a not guilty finding has to be unanimous. All 12 have to agree.
>
> JUROR NUMBER ONE: Right.
>
> THE COURT: My question to you is, are you so deadlocked that you're not going to be able to reach an agreement no matter how long we stay here tonight?

JUROR NUMBER ONE: I would say that statement would be true, yes.

THE COURT: Well, that's not my statement, that's a question.

JUROR NUMBER ONE: Oh, the answer is yes, we are deadlocked.

THE COURT: All right, hopelessly?

JUROR NUMBER ONE: I would say so, sir, yes.

THE COURT: All right. If you have your numbers together, and I don't want names, but if you have your numbers I would like to know what your count was on capital murder.

JUROR NUMBER ONE: That was unanimous against that. No.

THE COURT: Okay, on murder in the first degree?

JUROR NUMBER ONE: That was unanimous against that.

THE COURT: Okay. Manslaughter?

JUROR NUMBER ONE: Nine for, three against.

THE COURT: Okay. And negligent homicide?

JUROR NUMBER ONE: We did not vote on that, sir.

> THE COURT: Did not vote on that.
>
> JUROR NUMBER ONE: No, sir. We couldn't get past the manslaughter. Were we supposed to go past that? I thought we were supposed to go one at a time.

The court then stated that it appeared the jury had not completed its deliberations, and the court again requested the jury to deliberate further. While the jury resumed deliberations, counsel for Appellant requested that the court submit verdict forms to be completed by the jurors on the counts that they had decided upon. The State objected, noting that the jury had resumed its deliberations and had not yet made any findings. The circuit court denied Appellant's request. A short time later, when the jury again indicated that it had not reached a verdict, the circuit court declared a mistrial. Neither the State nor Appellant objected to the declaration of a mistrial. Appellant's trial was then rescheduled for March 2010.

Prior to the time scheduled for retrial, Appellant filed several motions in circuit court, arguing that the Fifth Amendment's double-jeopardy provision, as well as Arkansas's double-jeopardy statutes, barred his retrial on the capital-murder charge and the lesser-included offense of first-degree murder. In support of his motions, he argued that the jury forewoman's announcement in open court that the jury had found him not guilty on those two charges amounted to an acquittal, such that he could not again be tried on those charges. The circuit court

entered an order on February 26, 2010, denying Appellant's motions. In so ruling, the circuit court stated as follows:

> This Court finds, after review of the transcript of Defendant Blueford's first trial, that the jury foreperson was explicit that the jury was unanimous in voting against finding Defendant Blueford guilty of capital murder and first degree murder. However, there were no "findings" or "verdicts" as intended by the law. The jury was unable to complete its deliberations and this Court had to declare a mistrial.

The sole issue on appeal is whether the circuit court erred in finding that jeopardy had not attached, thus, allowing the State to retry Appellant on the charges of capital murder and first-degree murder. This court reviews de novo a circuit court's denial of a motion to dismiss on double-jeopardy grounds. *Koster v. State*, 374 Ark. 74, 286 S.W.3d 152 (2008). When the analysis presents itself as a mixed question of law and fact, the factual determinations made by the circuit court are given due deference and are not reversed unless clearly erroneous. *Id.* However, the ultimate decision by the circuit court that the defendant's protection against double jeopardy was not violated is reviewed de novo, with no deference given to the circuit court's determination. *Id.* Finally, we note that a double-jeopardy claim may be raised by interlocutory appeal because if a defendant is illegally tried a second time, the right would have

been forfeited. *See Williams v. State*, 371 Ark. 550, 268 S.W.3d 868 (2007).

Appellant argues that we are called upon to decide the implications of Arkansas's transitional jury instruction, which is given in criminal cases where the jury is allowed to consider lesser-included offenses. According to Appellant, because the jury was instructed that it could not consider his guilt on a lesser-included offense until it made a determination on the greater offense and the jury forewoman then announced in open court that the jury had found him not guilty of capital murder and first-degree murder, he was acquitted on those two charges. Appellant further argues that entry of a formal judgment is not essential, as the jury's finding of not guilty is sufficient to bar further prosecution on those two charges. Finally, Appellant asserts that the jury determinations were final because they were not given any type of step-back instruction that would have allowed the jury to resume deliberations on the capital-murder or first-degree murder charges.

The State counters that where a jury is discharged before completion of a case, a defendant may invoke his right against double jeopardy, except in cases of overruling necessity. The State further asserts that where a defendant consents to a mistrial, there is no requirement of demonstrating overruling necessity. Thus, according to the State, Appellant, who impliedly agreed to the mistrial by failing to object to the granting of the mistrial, may be tried again. Moreover, the State asserts that the deadlocked jury in the first trial constituted an overruling necessity warranting the mistrial.

This court has explained as follows:

> Both the Fifth Amendment to the United States Constitution and article 2, § 8 of the Arkansas Constitution require that no person be twice put in jeopardy of life or liberty for the same offense. The Double Jeopardy Clause protects criminal defendants from: "(1) a second prosecution for the same offense after acquittal, (2) a second prosecution for the same offense after conviction, and (3) multiple punishments for the same offense."

Koster, 374 Ark. at 81, 286 S.W.3d at 159 (quoting *Hughes v. State*, 347 Ark. 696, 702, 66 S.W.3d 645, 648 (2002)) (citation omitted). Thus, once the jury has been sworn and jeopardy attaches, the court can grant a mistrial without barring subsequent prosecution only if there is an "overruling necessity." *See Smith v. State*, 307 Ark. 542, 545, 821 S.W.2d 774, 776 (1992) (quoting *Wilson v. State*, 289 Ark. 141, 145, 712 S.W.2d 654, 656 (1986)). Under Arkansas law it is well settled that a deadlocked jury is a circumstance that qualifies as an overruling necessity. *Shaw v. State*, 304 Ark. 381, 802 S.W.2d 468 (1991). The decision to order a mistrial due to a jury's inability to reach a verdict is within the sound discretion of the circuit court, and will be upheld absent an abuse of discretion. *Id.*

Here, Appellant does not challenge the fact that the hung jury in the first trial was an overruling necessity that required the declaration of a mistrial. Instead, he argues that he was acquitted on the two

charges by virtue of the fact that the jury, which was given the transitional instruction, announced in open court that it had found him not guilty of capital murder and first-degree murder, and he cannot now be retried on those two charges. Thus, the question at issue for this court is what effect, if any, the announcement in open court had on the State's ability to retry Appellant on those two charges.[1]

Both the United States Supreme Court and this court have recognized that a trial ending in a hung jury is not the equivalent of an acquittal for purposes of establishing former jeopardy. *See Richardson v. United States*, 468 U.S. 317 (1984) (explaining that trial court's declaration of a mistrial because of a hung jury was not an event that terminated the original jeopardy to which the defendant was subjected); *see also Prince v. State*, 304 Ark. 692, 805 S.W.2d 46 (1991). Moreover, it is axiomatic that a judgment is not valid until entered of record. *See Bradford v. State*, 351 Ark. 394, 94 S.W.3d 904 (2003). We further stated in *Bradford* that a judgment rendered in open court is not controlling until entered or filed of record. *Id.* The mere reading of the jury's verdict in open court does not constitute an acquittal. *Id.* Further, a jury's verdict may be amended before it is entered of record, before the jury has separated, and after a poll of each juror reveals that each understands the effect of the verdict. *Barnum v. State*, 268 Ark. 141, 594 S.W.2d 229 (1980).

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[1] Appellant does not challenge the State's ability to retry him on the charges of manslaughter and negligent homicide.

It is true that the foregoing cases did not address any implication of the transitional instruction. Nevertheless, neither the giving of those instructions nor the forewoman's announcement in open court that the jury found Appellant not guilty on those two charges negates the bedrock principle of law that a judgment is not valid until entered of record. It is undisputed that no formal acquittal was entered of record in this case, and we find unavailing Appellant's assertion that a formal verdict of acquittal was not necessary. In support of his contention, Appellant relies on Ark. Code Ann. § 5-1-112(1)(B)(i) (Repl. 2006), which provides that an acquittal occurs when the "former prosecution resulted in a determination of not guilty." But, the statutory provision for what constitutes an acquittal in no way forecloses the requirement that for an acquittal to be final it must be entered of record. If we were to accept Appellant's argument, we would be ruling contrary to years of jurisprudence, and this we will not do.

We recognize that there are prior cases where this court has stated that, in criminal cases, a general verdict is not actually required to be in writing, but may be announced orally. *Rowland v. State*, 263 Ark. 77, 562 S.W.2d 590 (1978); *Dixon v. State*, 29 Ark. 165 (1874); *Atkins v. State*, 16 Ark. 568 (1855). In *Dixon*, we explained that the verdict need not be in writing, but may be announced by the foreman of the jury orally and then entered by the clerk in proper form upon the record. Here, however, the jury forewoman was not making a formal announcement of acquittal. She was engaged in a discussion with the circuit court about the jury's

deliberations and the jurors' inability to agree on a verdict. Thus, this is a not a situation where a formal verdict was announced or entered of record.

A similar issue arose in *Walters v. State*, 255 Ark. 904, 503 S.W.2d 895 (1974). There, this court rejected a double-jeopardy argument where the circuit court inquired into the deliberations, stating as follows:

> Neither can we agree with appellant that the first trial resulted in an implied acquittal of all degrees in excess of involuntary manslaughter. The statements between the trial court and the jury foreman cannot be considered under the circumstances as a verdict of the jury. *See* Ark. Stat. Ann. § 43-1226 (Repl. 1964).

Id. at 906–07, 503 S.W.2d at 897. Appellant takes issue with the applicability of *Walters* to his own case, arguing that its ruling was based on a statute that has since been repealed. According to Appellant, the repeal of section 43-1226 renders *Walters* inapplicable to the instant case. Appellant simply views the import of *Walters* too narrowly. Section 43-1226 provided that "[w]here an offense consists of different degrees, a conviction, or acquittal by judgment upon a verdict shall be a bar to another prosecution for the offense in any of its degrees." This statute, which was subsequently incorporated into Ark. Code Ann. § 16-85- 712 (1987), was repealed in 2005. According to Appellant, by repealing this provision the legislature intended to abolish the formalities attendant to a final verdict by endorsing

an informal determination by a jury. We agree with the State that the repeal did not indicate such a desire and was more likely the result of a desire to bring statutory authority in line with state and federal precedents and that while *judgments* are no longer required to bar subsequent prosecutions, an actual verdict is still required. Appellant also claims that *Walters* is of no moment because it does not address the issue of transitional instructions. Again, Appellant too narrowly construes *Walters*. While the case is factually distinguishable, it demonstrates that this court has rejected the notion that a discussion between the court and the jury foreperson amounts to an acquittal where no final verdict was entered.

Although Appellant did not request that the circuit court poll the jury or request that an acquittal be entered of record, he did request that the jury be given verdict forms on the charges of capital murder and first-degree murder. In essence, what Appellant sought was a partial verdict. *See Walker v. State*, 308 Ark. 498, 825 S.W.2d 822 (1992).[2] Jurisdictions are split on the issue of partial verdicts. But, the majority of jurisdictions have held that if a single charge includes multiple degrees of offenses, the trial court may not conduct a partial-verdict inquiry as to the offenses included within the charge. *See, e.g.*, *Richardson*, 184 P.3d 755; *People v. Hall*, 324 N.E.2d

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[2] Although this court did not specifically define "partial verdict" as the term is used in the instant case, it refers to a verdict on some, but not all, of the offenses within the single charge of capital murder. *See People v. Richardson*, 184 P.3d 755 (Colo. 2008).

50 (Ill. 1975); *State v. Bell*, 322 N.W.2d 93 (Iowa 1982); *State v. McKay*, 535 P.2d 945 (Kan. 1975); *Commonwealth v. Roth*, 776 N.E.2d 437 (Mass. 2002); *State v. Booker*, 293 S.E.2d 78 (N.C. 1982); *People v. Hickey*, 303 N.W.2d 19 (Mich. Ct. App. 1981).

The minority, on the other hand, has held that double jeopardy requires a partial verdict of acquittal as to the greater offenses if the jury is deadlocked only as to the lesser offenses. *See, e.g., Stone v. Superior Court*, 646 P.2d 809 (Cal. 1982); *State v. Tate*, 773 A.2d 308 (Conn. 2001); *State v. Pugliese*, 422 A.2d 1319 (N.H. 1980); *Whiteaker v. State*, 808 P.2d 270 (Alaska Ct. App. 1991). The minority of jurisdictions that accept partial verdicts seem to focus on the fact that there can be no "manifest necessity" warranting the declaration of a mistrial where the circuit court makes no inquiry into the jury's deliberations as to the greater offenses. *People v. Anderson*, 211 P.3d 584 (Cal. 2009).

We are simply unpersuaded by the underlying rationale supporting the minority view. Moreover, this court has rejected the concept of a partial verdict in *Walker*, 308 Ark. 498, 825 S.W.2d 822. There, the appellant's first trial ended in a mistrial because of a hung jury. During his retrial, he sought a continuance to obtain the presence of the jurors who sat on his first trial based on his assertion that they could testify that they had found him not guilty on the greater offense of capital murder. His motion was denied, and on appeal he alleged this was error. This court affirmed, stating as follows:

> Although appellant refers to a "partial verdict" when discussing the murder charges, the short answer to his argument is that the first trial resulted in a hung jury which produced no verdict at all. No double jeopardy issue exists, and the trial court did not abuse its discretion in denying appellant's motion for continuance.

Id. at 504, 825 S.W.2d at 825. Accordingly, we find no merit to Appellant's contention that the circuit court erred in denying his motions to prevent his retrial on the charge of capital murder and its lesser-included offenses.

Affirmed.

APPENDIX B

IN THE CIRCUIT COURT OF PULASKI COUNTY, ARKANSAS SEVENTH DIVISION

No. CR 2008-2797

State of Arkansas,
Plaintiff,

v.

Alex Blueford,
Plaintiff.

Order Denying Defendant Blueford's Double Jeopardy-Based Motion to Dismiss the Pending Charges of Capital Murder and First Degree Murder

The Court denies Defendant Blueford's double jeopardy-based motion to dismiss the charges pending in this case of capital murder and first degree murder. This Court finds, after review of the transcript of Defendant Blueford's first trial, that the jury foreperson was explicit that the jury was unanimous in voting against finding Defendant

Blueford guilty of capital murder and first degree murder. However, there were no "findings" or "verdicts" as intended by the law. The jury was unable to complete its deliberations and this Court had to declare a mistrial.

THEREFORE, this Court denies Defendant Blueford's double jeopardy-based motion to dismiss the pending charges in this case of capital murder and first degree murder. This Court finds that Defendant Blueford may be retried on capital murder and all of the lesser included offenses of capital murder that he was tried on in his first trial in this case.

_____

Special Circuit Court Judge

Lance Hanshaw

Date:

_____

APPROVED AS TO FORM:

_____

DEPUTY PROSECUTING ATTORNEY

_____

DEPUTY PUBLIC DEFENDER

APPENDIX C

February 24, 2011

Clint Miller
Deputy Public Defender
201 S. Broadway, Suite 210
Little Rock, Arkansas 72201

RE: CR 10 00554
Alex Blueford
v.
State of Arkansas

Dear Mr. Miller:

The Arkansas Supreme Court issued the following orders today in the above styled case:

> "Appellant's petition for rehearing is denied. Appellant's request to stay issuance of the mandate is granted."

Sincerely,

Leslie W. Steen, Clerk

LWS: sc
cc: Eileen W. Harrison, Ass't AG
Pulaski Circuit Clerk
(No. CR 2008-2797)

APPENDIX D
Excerpt of Trial Transcript of August 20, 2009

effort to reach a proper verdict.

Therefore, I request the jury to retire for further deliberation for a reasonable time in an attempt to reach a verdict.

If you are unable, you knock on the door and let the bailiff know that you need to see the Court. But at this point, the Court's going to ask you to go back for a reasonable time to see if you are able to reach a verdict.

JUROR NUMBER ONE: Okay.

(THEREUPON, at 8:47 o'clock p.m., the jurors returned to the jury room; then at 9:21 o'clock p.m. the jury sent out a note and the following proceedings occurred:)

THE COURT: All right, Court's back in session. Madam foreman, the Court has a note from the jury stating, (as read), "The jury cannot agree on any one charge in this case."

Are you telling this Court that you're hopelessly deadlocked on every charge?

JUROR NUMBER ONE: I'm not sure I understand what you mean, sir. To consider --

THE COURT: Well, you're obviously in your agreement -- any -- any charge, conviction of any charge, or even a not guilty finding has to be

unanimous. All 12 have to agree.

JUROR NUMBER ONE: Right.

THE COURT: My question to you is, are you so deadlocked that you're not going to be able to reach an agreement no matter how long we stay here tonight?

JUROR NUMBER ONE: I would say that statement would be true, yes.

THE COURT: Well, that's not my statement, that's a question.

JUROR NUMBER ONE: Oh, the answer is yes, we are deadlocked.

THE COURT: All right, hopelessly?

JUROR NUMBER ONE: I would say so, sir, yes.

THE COURT: All right. If you have your numbers together, and I don't want names, but if you have your numbers I would like to know what your count was on capital murder.

JUROR NUMBER ONE: That was unanimous against that. No.

THE COURT: Okay, on murder in the first degree?

JUROR NUMBER ONE: That was unanimous against that.

THE COURT: Okay. Manslaughter?

JUROR NUMBER ONE: Nine for, three against.

THE COURT: Okay. And negligent homicide?

JUROR NUMBER ONE: We did not vote on that, sir.

THE COURT: Did not vote on that.

JUROR NUMBER ONE: No, sir. We couldn't get past the manslaughter. Were we supposed to go past that? I thought we were supposed to go one at a time.

MR. JONES: Your Honor, may we approach?

THE COURT: Yes, just a moment. Hold it.

(WHEREUPON, counsel for the State and Defense approached the bench and a conversation between Court and Counsel ensued, out of the hearing of the jury, as follows:)

THE COURT: All right, I propose I send them back.

MR. JONES: Well.

THE COURT: I mean, they haven't even taken a vote on it. I can't suggest that they do that, but I'm going to -- send her back. I don't think they've completed their deliberation.

MRS. KIEL: We would ask that they continue, Your Honor.

THE COURT: Pardon?

MRS. KIEL: We would ask that they continue. We'd ask that you re-read the Dynamite Charge.

THE COURT: You what?

MRS. KIEL: Would you ask -- we would ask that you

re-read the Dynamite Charge.

MR. JONES: We'll defer to the Court.

THE COURT: Well.

MRS. KIEL: In the alternative --

THE COURT: I mean, under any reasonable circumstances, they would at least take a vote on negligent homicide. All right.

(THEN, in open court:)

THE COURT: All right, based upon what you have just informed the Court about, Madam Foreman, it would appear that perhaps you have not completed deliberations.

It again, it's in the interest of the State of Arkansas and of the defendant for you to reach an agreement in this case if at all possible. A hung jury means a continuation of the case and a delay in the administration of justice.

In other words, this case will have to be tried again.

You should consider that this case will have to be decided by some jury, and in all probability upon the same testimony and evidence. It is unlikely that the case will ever be submitted to 12 people more intelligent, more impartial or more competent to decide it. Under your oath as jurors, you have

obligated yourselves to render verdicts in accordance with the law and the evidence.

In your deliberations you should weigh and discuss the evidence and make every reasonable effort to harmonize your individual views on the merits of the case. Each of you should give due consideration to the views and opinions of other jurors who disagree with your views and opinions. No juror should surrender his sincere beliefs in order to reach a verdict. To the contrary, the verdict should be the result of each juror's free and voluntary opinion. By what I have said as to the importance of the jury reaching a verdict, I do not intend to suggest or require that you surrender your conscientious conviction, only that each of you make every sincere effort to reach a proper verdict.

Therefore, I request the jury to retire for further deliberation for a reasonable time in an attempt to reach a verdict.

I'm going to send you back at this point. And once you have completed your deliberations, you knock on the door and let the bailiff know.

(THEREUPON, at 9:28 o'clock p.m., the jury returned to the jury room.)

THE COURT: Do you think they got my drift?

MR. JONES: I think so, Your Honor.

COURT REPORTER: Are we off the record now?

THE COURT: We're off.

All right, we're back on the record.

MRS. KIEL: Your Honor --

THE COURT: The jury is still out, but we're on the record.

MRS. KIEL: Your Honor, we would ask that the jury be given verdict forms and that they fill out verdict forms for those counts that they have reached a verdict on. And if there remains a hung jury on the remaining counts, then so be it.

But we also have an obligation to move forward where we can. And we're looking at, at least on the Defense side, expenditures of $10,000 or more at repeating this at a capital murder rate. And if the jury is decisive about the capital murder and the murder one, we would want those verdict forms submitted to them. That is our request.

MR. JONES: Your Honor, the State would argue against that. The State's position is they are still deliberating at this point and they have not made any findings. The Court was merely asking questions to gauge their temperature to see how long we will be here. It's -- I don't feel that it -- the State doesn't

feel that it would be appropriate to -- to get any verdict form. Either -- it's all or nothing. They can come to an agreement or they cannot. And they have indicated now on two different occasions that they cannot come to an agreement. So I don't think we can --

THE COURT: Well, it's -- it's -- it's like changing horses in the middle of the stream. I mean, we have submitted the instructions and the verdict forms. And to go back and then change that at this time, frankly, would create a mistrial within itself and that would not be appropriate.

MRS. KIEL: Okay, thank you.

MR. JONES: Now, Your Honor, if the -- if Defense counsel is asking this Court to declare a mistrial at this point because they cannot reach a verdict, then I think that's a separate issue and the State would likely join in that. I mean, they have been out for quite some time.

But I don't think, as the Court just stated, I don't think we can piecemeal this out. It's all or nothing.

MR. TOBLER: We are not asking for a mistrial at this point, Your Honor.

THE COURT: Well, the Court is going to declare

one if the jury doesn't make a decision. I mean, they have been out hours and hours and hours now. And they have indicated twice that they're hopelessly deadlocked. I don't think they have an understanding of really that they don't have to get past every charge unanimously before they can move to the next charge. But I'm not in the jury room and I don't tell the jury -- I never tell the jury what to do.

MR. JONES: Yes, sir.

THE COURT: Except in a Dynamite Charge. So I'm going to give them a few more minutes and then I'm going to have the bailiff bang on the door to see if they're making any progress.

MRS. KIEL: Okay.

THE COURT: And then we will -- we will proceed accordingly.

MRS. KIEL: Thank you.

MR. JONES: Thank you, Your Honor.

(THEREUPON, at 9:59 o'clock p.m., the jury returned to the courtroom; then the following proceedings occurred:)

THE COURT: Madam Foreman, has the jury reached a verdict?

JUROR NUMBER ONE: No, it has not, sir.

THE COURT: Madam Foreman, there seems to be a

lot of confusion on the part of the -- of the jury about some of the instructions. And because of the confusion and because of the timeliness and the amount of hours that has gone by without being able to reach a verdict, the Court is going to declare a mistrial.

You can take your badges off. Make sure that all of the exhibits are back in here, and the instructions. Leave the instructions. The copies of the instructions that you had, did you leave them in there?

JUROR NUMBER ONE: Yes, all the copies are in there. This is the original.

THE COURT: All right, in there.

I want to thank you so much for the time that you've spent on this. You've spent three extremely long days and I'm sorry that you weren't able to reach a verdict. But I do thank you for your service and you are excused. Call in whenever you're supposed to call in for your next jury trial.

JUROR NUMBER ONE: And the notes that we've taken?

THE COURT: Your notes you take with you and destroy. If you wish to give them to the bailiff, then the bailiff will destroy them.

JUROR NUMBER ONE: The bailiff will destroy them.

OPPOSITION BRIEF

RECORD AND BRIEFS

No. 10-1320

FILED
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In The Supreme Court of the United States

ALEX BLUEFORD,

Petitioner,

v.

STATE OF ARKANSAS,

Respondent.

On Petition For A Writ Of Certiorari To The Supreme Court Of Arkansas

RESPONDENT'S BRIEF IN OPPOSITION

DUSTIN MCDANIEL
Arkansas Attorney General

DAVID R. RAUPP*
Senior Assistant Attorney General

EILEEN W. HARRISON
Assistant Attorney General

OFFICE OF THE ATTORNEY GENERAL
323 Center Street, Suite 200
Little Rock, AR 72201
(501) 682-8112
Fax: (501) 682-8023
david.raupp@arkansasag.gov

**Counsel of Record*

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QUESTION PRESENTED

Is an informal exchange between a foreperson and the trial judge a final verdict that terminates jeopardy under the Fifth Amendment?

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
TABLE OF CONTENTS	ii
TABLE OF AUTHORITIES	1
OPINION BELOW	1
JURISDICTION	1
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	1
STATEMENT OF THE CASE	2
REASONS FOR DENYING THE WRIT	2
Adequate State Grounds Support the Arkansas Supreme Court's Finding that an Informal Exchange between the Circuit Court and Jury Foreperson is Not a Verdict of Acquittal	2
CONCLUSION	11

TABLE OF AUTHORITIES

Page

CASES

Ball v. United States, 163 U.S. 662 (1896) 9

Barnum v. State, 268 Ark. 141, 594 S.W.2d 229 (1980) 5, 7

Blueford v. State, 2011 Ark. 8, ___ S.W.3d ___ 1

Coleman v. Thompson, 501 U.S. 722 (1991) 3

Commonwealth v. Roth, 776 N.E.2d 437 (Mass. 2002) 10

Florida v. Powell, 130 S. Ct. 1195 (2010) 3

Givens v. State, 25 A. 689 (Md. 1893) 4

Grant v. State, 14 So. 757 (Fla. 1894) 4

Green v. United States, 355 U.S. 184 (1957) 3

Herb v. Pitcairn, 324 U.S. 117 (1945) 3

Humbert v. Commonwealth, 514 S.E.2d 804 (Va. App. 1999) 8

Lewis v. United States, 466 A.2d 1234 (D.C. 1983) 5

McPherson v. State, 29 Ark. 225 (1874) 3

People v. Barnard, 12 P.3d 290 (Colo. App. 2000) 8

People v. Beasley, 893 N.E.2d 1032 (Ill. App. 2008) 8

People v. Simms, 921 N.E.2d 582, 893 N.Y.S.2d 815 (N.Y. 2009) 7

TABLE OF AUTHORITIES – Continued

Page

Rhodes v. State, 290 Ark. 60, 716 S.W.2d 758 (1986) 7

Simpson v. State, 3 So.3d 1135 (Fla. 2009) 5

State v. Bell, 537 A.2d 496 (Conn. App. 1988) 8

State v. Cartagena, 409 N.W.2d 386 (Wis. App. 1987) 8

State v. Mills, 19 Ark. 476 (1858) 4

State v. Milton, 840 A.2d 835 (N.J. 2004) 8

State v. Panker, 532 P.2d 1073 (Kan. 1975) 8

State v. Pyatt, 1 P.3d 953 (Mont. 2000) 8

State v. Rodriguez, 603 A.2d 536 (N.J. Super. 1992) 9

State v. Tate, 773 A.2d 308 (Conn. 2001) 10

State v. Williams, 794 N.E.2d 27 (Ohio 2003) 5, 7

Stone v. Superior Court of San Diego County, 646 P.2d 809 (Cal. 1982) 8

Thomas v. United States, 544 A.2d 1260 (D.C. 1988) 7

United States v. Chinchic, 655 F.2d 547 (4th Cir. 1981) 5

United States v. McCoy, 429 F.2d 739 (D.C. Cir. 1970) 8

United States v. Rastelli, 870 F.2d 822 (2d Cir.), *cert. denied*, 493 U.S. 982 (1989) 9

TABLE OF AUTHORITIES – Continued

Page

Walters v. State, 255 Ark. 904, 503 S.W.2d 895 (1974) 9

Whiteaker v. State, 280 P.2d 270 (Alaska 1991) 10

STATUTES

28 U.S.C. § 1257 3

Ark. Code Ann. § 16-89-126 (Repl. 2005) 1, 4

Ark. Code Ann. § 16-89-128 (Repl. 2005) 2, 6, 7

OTHER AUTHORITIES

6 Wayne LaFave, *et al. Criminal Procedure* § 25.3(b) (3d ed. 2009) 10

OPINION BELOW

The State of Arkansas, respondent, opposes the petition of Alex Blueford requesting a writ of certiorari to review the judgment of the Arkansas Supreme Court affirming the denial of his motion to dismiss based on double jeopardy. That Court's opinion was delivered on January 20, 2011, and is published as *Blueford v. State*, 2011 Ark. 8, ___ S.W.3d ___ and is reported in petitioner's Appendix A.

JURISDICTION

Respondent disputes jurisdiction because the state-court decision rested on an adequate and independent state-law ground that an informal exchange between the circuit court and the jury's foreperson was not a final verdict.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the Constitution prohibits placing persons in jeopardy of life or limb more than once and is applied to the states under the Due Process Clause of the Fourteenth Amendment.

Arkansas Code Annotated § 16-89-126(a) (Repl. 2005) states, in pertinent part, that when jurors have agreed upon their verdict, they must be conducted into the courtroom, their names called by the clerk, and their foreman must declare their verdict.

Arkansas Code Annotated § 16-89-128 (Repl. 2005) states, in pertinent part, that upon the rendition of a verdict, the jury may be polled at the instance of either party and, if one juror answers in the negative, the verdict cannot be received.

STATEMENT OF THE CASE

Respondent relies on the statement of the facts and proceedings in this case set forth in the opinion rendered by the Arkansas Supreme Court. Specifically, the Arkansas Supreme Court noted that neither the State nor petitioner objected to the declaration of a mistrial; that petitioner did not challenge, on appeal, that the hung jury in the first trial represented an overruling necessity that required the declaration of the mistrial; and that petitioner argued on appeal that the announcement by the foreperson in open court represented a verdict of acquittal. *Blueford* (App. A, 7a-9a).

REASONS FOR DENYING THE WRIT

Adequate State Grounds Support the Arkansas Supreme Court's Finding that an Informal Exchange between the Circuit Court and Jury Foreperson is Not a Verdict of Acquittal.

If there are adequate and independent state grounds to support a state-court judgment, there is no

jurisdiction under 28 U.S.C. § 1257. *E.g.*, *Coleman v. Thompson*, 501 U.S. 722, 729 (1991); *see also Florida v. Powell*, 130 S. Ct. 1195, 1202 (2010) (if the state-court decision indicates clearly and expressly that it is alternatively based on separate, adequate, and independent grounds, the decision will not be reviewed). It is well-settled that this Court will not render an advisory opinion, and if the same judgment would be rendered by a state court after its views of federal law are corrected, such review would amount to nothing more than an advisory opinion. *E.g.*, *Coleman*, 501 U.S. at 729; *see also Herb v. Pitcairn*, 324 U.S. 117, 126 (1945). In short, if resolution of a federal question cannot affect the judgment, nothing need be done by this Court. *E.g.*, *Coleman*, 501 U.S. at 730.

Petitioner asserts that the Arkansas Supreme Court's opinion conflicts with established federal jurisprudence that the Fifth Amendment mandates an implied acquittal when a jury renders a verdict of guilty on a lesser-included offense. *See Green v. United States*, 355 U.S. 184, 189 (1957). The Arkansas Supreme Court has adhered to this principle for over 100 years: "the finding of a verdict of manslaughter upon an indictment for murder is equivalent to an acquittal of the charge of murder." *McPherson v. State*, 29 Ark. 225, 233 (1874). In *Green* and *McPherson*, the defendants had been convicted of lesser-included offenses by unanimous verdicts. That is not what happened in this case.

Despite petitioner's claim that he was acquitted of the greater offenses, there was no verdict on any of the charged offenses. The Arkansas Supreme Court rejected petitioner's double-jeopardy claim because the record did not disclose that a final verdict had been rendered. The Court stated: "the question at issue for this court is what effect, if any, the announcement in open court had on the State's ability to retry Appellant on [the greater charges]." *Blueford* (App. A, p. 9a). The Arkansas Supreme Court concluded that the "mere reading of the jury's verdict in open court does not constitute an acquittal." *Blueford* (App. A, p. 9a). That holding affirmed Arkansas's adherence to well-established procedures attendant to the rendition of verdicts that are grounded in the predominant common-law practices which have been codified by the Arkansas General Assembly. *See* Ark. Code Ann. § 16-89-126 (Repl. 2005) (stating, in pertinent part, that jurors must be conducted into the courtroom by a court officer, their names called by the clerk, and the verdict declared by the foreman); *see also State v. Mills*, 19 Ark. 476 (1858) (a verdict is not valid until it is delivered by the jury and formally announced in the presence of the court and the parties). The procedures required under Arkansas law are and have been prevalent in state and federal courts for years. *See Grant v. State*, 14 So. 757, 759 (Fla. 1894) (a final verdict must be pronounced in open court and affirmed when an officer of the court instructs jurors to hearken to their verdict); *Givens v. State*, 25 A. 689, 689-690 (Md. 1893) (when members of a jury reach a verdict, they return to court and

deliver it, the clerk then calls them over, by their names, and asks them whether they agree on their verdict); *Lewis v. United States*, 466 A.2d 1234, 1238 (D.C. 1983) (a final verdict must be announced in open court with no dissent registered, accepted by the trial court, and entered in the record).

These general state and federal practices, with which Arkansas concurs, have established the essential components of a final verdict: (1) the deliberations are concluded; (2) the result is announced in open court; (3) the jury is polled and no dissent is registered. *See, e.g.*, *State v. Williams*, 794 N.E.2d 27, 38 (Ohio 2003). These procedures are essential for the creation of a bright line of finality. Thus, any actions taken by the jury before the final procedure is concluded are subject to change. Votes taken in the jury room prior to being returned in open court are merely preliminary because any juror is entitled to change his or her mind up until the time the verdict is accepted by the trial court. *E.g.*, *United States v. Chinchic*, 655 F.2d 547, 550 (4th Cir. 1981). Consistent with this precedent, Arkansas recognizes that a jury is free to amend its verdict until it is entered of record, each juror has been polled, and the jury is discharged. *Blueford* (App. A, p. 9a); *see also Barnum v. State*, 268 Ark. 141, 144, 594 S.W.2d 229, 231 (1980). Similarly, there is widespread consensus within other jurisdictions that a juror cannot repudiate his or her verdict after it has been formally rendered, a poll taken, and it has been accepted by the court. *E.g.*, *Williams*, 794 N.E.2d at 37; *Simpson v.*

State, 3 So.3d 1135, 1143 (Fla. 2009). In this case, the jury returned to deliberate after the foreperson revealed the contents of its preliminary findings. (App. D, pp. 22a-23a). Thus, each juror remained free to change his or her mind during this final period of deliberations.

The Arkansas Supreme Court found that a discussion between the court and the jury foreperson did not amount to an acquittal because a final verdict was not entered or filed of record. *Blueford* (App. A, pp. 9a, 12a). Furthermore, it noted that petitioner did not request that the circuit court poll the jury or otherwise attempt to obtain a verdict of record. *Blueford* (App. A, p. 12a). In fact, petitioner stood mute while the circuit court called the jury back into the courtroom, declared a mistrial, and discharged the jury. (App. D, pp. 25a-26a). Petitioner never raised a double-jeopardy issue to the circuit court, and, on appeal, never argued that the circuit court erred or abused its discretion.

In Arkansas, each party has a right to poll the jury after the verdict has been read by the foreman. *See* Ark. Code Ann. § 16-89-128 (Repl. 2005). In this case, there was no poll because none was requested. (App. A, p. 12a; App. D, pp. 23a-26a). Petitioner now asks this Court to recognize an informal statement made by the foreperson as a final verdict, confirming that petitioner was unanimously acquitted of capital murder and first-degree murder. Petitioner's assertion that he was acquitted of these two crimes may have been on firmer ground had the jury been polled

before it was discharged because the Arkansas Supreme Court previously had made clear that a jury poll which results in an answer by each individual juror is the best measure of a jury's intent. *Barnum*, 268 Ark. at 145, 594 S.W.2d at 231. Like Arkansas, other jurisdictions have made clear that the purpose of a jury poll is to establish with certainty that a unanimous verdict has been reached. *See, e.g.*, *Williams*, 794 N.W.2d at 38-39. The Arkansas Supreme Court's concern that no poll was taken in this case is consistent with the axiom that a verdict becomes immutable when it is confirmed by a poll which is the benchmark of finality because it signals the conclusive nature of the verdict. *Id.* The test for the validity of a verdict is whether it is certain, unqualified, and unambiguous in light of the circumstances surrounding its receipt. *E.g.*, *Thomas v. United States*, 544 A.2d 1260, 1262 (D.C. 1988). Uncertainty or contingency as to the finality of the jury's determination is equivalent to no verdict. *E.g.*, *id.* The concern that no poll was taken arose because it is not uncommon for a juror to express doubt while an individual poll is taking place and such expressions of uncertainty negate the verdict. *Rhodes v. State*, 290 Ark. 60, 62-64, 716 S.W.2d 758, 760 (1986) (reversing a conviction as a result of juror's response to poll); *see also* Ark. Code Ann. § 16-89-128 (Repl. 2005) (stating that one negative response during a poll negates the verdict). Indeed, a plethora of state and federal cases reveal the frequency of juror dissent once individuals are called upon by the trial court to affirm the verdict. *People v. Simms*, 921 N.E.2d 582, 584, 893 N.Y.S.2d

815, 817 (N.Y. 2009); *People v. Beasley*, 893 N.E.2d 1032, 1040 (Ill. App. 2008); *State v. Milton*, 840 A.2d 835, 841 (N.J. 2004); *People v. Barnard*, 12 P.3d 290, 295 (Colo. App. 2000); *State v. Pyatt*, 1 P.3d 953, 956 (Mont. 2000); *Humbert v. Commonwealth*, 514 S.E.2d 804, 809-10 (Va. App. 1999); *State v. Bell*, 537 A.2d 496, 501 (Conn. App. 1988); *State v. Cartagena*, 409 N.W.2d 386, 388 (Wis. App. 1987); *State v. Panker*, 532 P.2d 1073, 1075-76 (Kan. 1975) (citing to multiple federal cases involving juror dissent); *United States v. McCoy*, 429 F.2d 739, 741 (D.C. Cir. 1970). The aforementioned cases clearly demonstrate that the procedures surrounding the rendition of verdicts are not simply empty formalities, but are in place to ensure that, in all cases, the verdicts of a jury reflect the correct, unanimous, and final conclusions of the jury. The record submitted to the Arkansas Supreme Court did not support the rendition of a certain and unambiguous verdict of acquittal.[1]

Rather than demonstrating that the jury had rendered a final verdict, the record revealed that a

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[1] This stands in stark contrast to the facts confronting the California Supreme Court in *Stone v. Superior Court of San Diego County*, 646 P.2d 809 (Cal. 1982), upon which petitioner relies. There, the defendant asked that the trial court provide a clear expression from the jury as to its findings on first- and second-degree murder and the court stated on the record: "I am ruling that there is a clear expression that . . . there is not one juror who believes that the evidence is sufficient to support a finding of first degree murder beyond a reasonable doubt." *Id.*, 646 P.2d at 813.

discussion transpired between the trial judge and the jury foreperson without any attendant formalities and before the jury had concluded its deliberations. Such informal exchanges are not recognized in Arkansas as verdicts on which jeopardy has terminated. *See Walters v. State*, 255 Ark. 904, 907, 503 S.W.2d 895, 896 (1974) (statements between a trial court and the foreperson will not be considered a verdict for double-jeopardy purposes). This does not conflict with this Court's holding that jeopardy terminates following a verdict of acquittal that is "duly returned and received[.]" *Ball v. United States*, 163 U.S. 662, 671 (1896). What constitutes a "duly returned" verdict is a question of state law in the first instance and not resolved by the Double Jeopardy Clause. Petitioner argued that the foreperson's remarks were made in open court and, therefore, constituted a final verdict on the greater offenses and her statements represented a clear acquittal because Arkansas law prohibited these jurors from considering lesser-included offenses unless they had first reached a not-guilty verdict on the greater offenses. The Arkansas Supreme Court rejected these arguments and found that a "duly returned" verdict is one that comports with the well-established common-law practice that requires a formal announcement and entry upon the record. *Blueford* (App. A, p. 11a); *see also United States v. Rastelli*, 870 F.2d 822, 834 (2d Cir.) (rejecting the argument that a verdict is final when announced by the foreman), *cert. denied*, 493 U.S. 982 (1989); *State v. Rodriguez*, 603 A.2d 536, 541 (N.J. Super. 1992) (no double jeopardy because the

initial verdict was not accepted by the court and jury was not polled); 6 Wayne LaFave, *et al. Criminal Procedure* § 25.3(b) (3d ed. 2009) (not every jury determination in favor of a defendant qualifies as a verdict).[2]

In sum, the Arkansas Supreme Court found that no verdict was entered and, therefore, jeopardy had not terminated. *Blueford* (App. A, p. 10a). This finding has nothing to do with the efficacy of partial verdicts, but speaks to the well-established requirement that any final verdict must be presented and received in such manner that each juror appreciates the finality and gravity of the verdict and unanimously affirms it. Even assuming that this Court concludes that double jeopardy requires the acceptance of partial verdicts, it would not change the outcome of this case, because under Arkansas law, no verdict, not even a partial verdict, was entered.

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[2] Petitioner argues that the Arkansas Supreme Court's finding of no formal acquittal does not diminish his double-jeopardy claim because other states have barred retrial of greater offenses solely based on inferences drawn from "hard transition" jury instructions. Petitioner is mistaken that verdicts were inferred from the jury instructions and fails to note that, in each case cited in his brief, the defendants either objected to the mistrial on the basis of double jeopardy, requested that the jury be polled, obtained affidavits from jurors establishing their intent, or obtained a partial verdict that was entered of record. *See State v. Tate*, 773 A.2d 308, 315, 317 n. 11 (Conn. 2001); *Whiteaker v. State*, 808 P.2d 270, 272-73 (Alaska 1991); *Commonwealth v. Roth*, 776 N.E.2d 437, 443-44 (Mass. 2002).

CONCLUSION

The petition for a writ of certiorari to the Arkansas Supreme Court should be denied.

Respectfully submitted,

DUSTIN MCDANIEL
Arkansas Attorney General

DAVID R. RAUPP*
Senior Assistant Attorney General

EILEEN W. HARRISON
Assistant Attorney General

OFFICE OF THE ATTORNEY GENERAL
323 Center Street, Suite 200
Little Rock, AR 72201
(501) 682-8112
Fax: (501) 682-8023
david.raupp@arkansasag.gov

**Counsel of Record*

REPLY BRIEF

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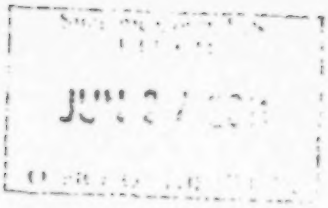

No. 10-1320

In the Supreme Court of the United States

ALEX BLUEFORD,
Petitioner,

v.

STATE OF ARKANSAS,
Respondent.

On Petition for a Writ of Certiorari to the Arkansas Supreme Court

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

WILLIAM R. SIMPSON, JR.
SHARON KIEL
CLINT MILLER
SIXTH JUDICIAL DISTRICT (ARKANSAS) PUBLIC DEFENDERS OFFICE
201 S. Broadway, Ste. 210
Little Rock, AR 72201
(501) 340-6120

CLIFFORD M. SLOAN
Counsel of Record
GEOFFREY M. WYATT
DAVID W. FOSTER
SKADDEN, ARPS, SLATE, MEAGHER & FLOM LLP
1440 New York Ave., N.W.
Washington, DC 20005
(202) 371-7000
cliff.sloan@skadden.com

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Table of Contents

Page

Table of Authorities ii

The Writ Should Be Granted 1

Conclusion 10

Table of Authorities

Cases

Basham v. State, 2011 Ark. App. 384 5

Commonwealth v. Roth, 776 N.E.2d 437 (Mass. 2002) 4

Green v. United States, 355 U.S. 184 (1957) 4

Michigan v. Long, 463 U.S. 1032 (1983) 4

Ohio v. Robinette, 519 U.S. 33 (1996) 4

Price v. Georgia, 398 U.S. 323 (1970) 2

Raley v. Ohio, 360 U.S. 423 (1959) 5

State v. Tate, 773 A.2d 308 (Conn. 2001) 4, 8, 9

Stone v. Superior Court, 646 P.2d 809 (Cal. 1982) 6, 8

Turner v. Arkansas, 407 U.S. 366 (1972) 3

Turner v. State, 452 S.W.2d 317 (Ark. 1970) 3

United Air Lines, Inc. v. Mahin, 410 U.S. 623 (1973) 6

Whiteaker v. State, 808 P.2d 270 (Alaska Ct. App. 1991) 9

MISCELLANEOUS

6 Wayne R. LaFave et al., Criminal Procedure ¶ 25.2(a) & n.9 (3d ed. 2007) 7

Brief of *Amici Curiae* Crim. L. Profs., *Blueford v. Arkansas*, No. 10-1320 (U.S. filed June 21, 2011) 2

THE WRIT SHOULD BE GRANTED

The state does not deny the existence or the importance of a square and deep split over the question whether federal Double Jeopardy principles compel recognition of a partial verdict when a jury deadlocks on a lesser-included offense. The state similarly does not offer any reason why this Court should not resolve the split and clarify the fundamental Double Jeopardy principles it implicates.

The state instead seeks to insulate the decision below from review by claiming, without basis in either fact or law, that the decision rests on an adequate and independent state-law ground. The state contends that the jury forewoman's announcement in open court that the jury was "unanimous against" two murder charges "was not a final verdict" as a matter of Arkansas law. (Br. in Opp'n ("BIO") 1.) Thus, says the state, "[e]ven assuming that this Court concludes that double jeopardy requires the acceptance of partial verdicts, it would not change the outcome of this case, because under Arkansas law, no verdict, not even a partial verdict, was entered." (*Id.* 10.)

The state is wrong for four simple reasons. First, the state's argument conflicts with numerous decisions from this Court holding that federal law treats state-court proceedings like Blueford's as federal acquittal equivalents for Double Jeopardy purposes, even if state law holds to the contrary. Second, the decision below cannot reasonably be read to rest on state law grounds because it explicitly invoked and relied on federal Double Jeopardy cases and principles. Third, the decision below squarely decided the Double Jeopardy issue Blueford raises here; and, in

any event, Blueford plainly preserved the issue by promptly moving for a partial verdict on the murder charges in the first trial and squarely raising his Double Jeopardy claims in the retrial proceedings both in the trial court and on appeal. Fourth, the state's arguments, on their own terms, do not even apply to two of the three federal Double Jeopardy bases Blueford has offered for relief.

This Court therefore undoubtedly has jurisdiction to review Blueford's Double Jeopardy claims. The extensive split among state courts and the fundamental importance of this core Double Jeopardy issue – both of which are highlighted by the three amicus briefs supporting the petition – provide compelling reasons for this Court to grant certiorari.

1. The question whether there was a final verdict on the two murder charges for Double Jeopardy purposes is, itself, a federal constitutional question – not simply a matter of state law. Thus, no state-law ruling below could be an "adequate" basis to support the decision by itself.

This Court has repeatedly held that, where a state court declines to recognize a verdict for which federal constitutional principles compel recognition, the state law must yield. That is the clear lesson, for example, of *Price v. Georgia*, in which this Court reversed the Georgia Supreme Court's holding that conviction on a lesser-included offense did not imply an acquittal on the greater offense. 398 U.S. 323, 325 (1970). Had state-law notions of finality been sufficient to supply an adequate ground for permitting the second trial in that case, this Court would have been without jurisdiction to decide it. See generally Br. of *Amici Curiae* Crim. L. Profs., *Blueford v.*

Arkansas, No. 10-1320 at 12-15 (U.S. filed June 21, 2011) (describing numerous cases in which this Court found decisions lacking the traditional formality of a final verdict form nevertheless to be "acquittal equivalents" as a matter of federal constitutional law).

Similarly, in *Turner v. Arkansas*, 407 U.S. 366 (1972), this Court considered whether the Double Jeopardy Clause barred trial of a defendant for robbery after the defendant had been acquitted of a charge of murder arising out of the same set of facts. The Arkansas Supreme Court had rejected the Double Jeopardy argument because murder and robbery are different offenses; it also had determined, purportedly as a matter of state law, that "it is at once apparent that *res judicata* is not applicable," in part because Arkansas state law provided that "[m]urder and robbery cannot be joined together in one indictment." *Turner v. State*, 452 S.W.2d 317, 320 (Ark. 1970). This Court rejected the latter determination as a bar to its review, explaining that the *res judicata* issue was itself a federal Double Jeopardy question: "Collateral estoppel is part of the Fifth Amendment's double jeopardy guarantee, . . . and it is a matter of constitutional fact [this Court] must decide . . . . Thus, the rejection of petitioner's claim by the Arkansas Supreme Court on procedural grounds does not foreclose our inquiry on this issue." 407 U.S. at 368 (citation and internal quotation marks omitted).

The same is true here (with the exception that, as explained below, in this case, unlike *Turner*, the Arkansas Supreme Court itself did not rest its decision on any procedural ground). Blueford contends that the right to a partial verdict "is part of the Fifth

Amendment's double jeopardy guarantee." Thus, the question whether the Double Jeopardy Clause compels recognition of the jury forewoman's statement in open court that the jury was "unanimous against" the murder charges either as a final verdict in itself or, at the very least, the basis for a partial-verdict inquiry, is a matter of constitutional magnitude. Indeed, the very basis other courts have cited for recognizing rights to a Double Jeopardy bar in cases like this one is that those "substantive rights . . . should not turn on . . . formalit[ies]." *State v. Tate*, 773 A.2d 308, 322 n.13 (Conn. 2001) (citing *Green v. United States*, 355 U.S. 184 (1957)); *Commonwealth v. Roth*, 776 N.E.2d 437, 450-51 (Mass. 2002).[1]

2. Nor did the Arkansas Supreme Court's opinion purport to give an "independent" state-law basis for the decision. As this Court has made clear, there is a "presumption" that a state-law ground is not independent, *Ohio v. Robinette*, 519 U.S. 33, 37 & n.* (1996), such that any ambiguity is resolved in favor of this Court's jurisdiction. A state court that wishes to clarify that its decision rests on state grounds should do so by way of "plain statement" to that effect. *Michigan v. Long*, 463 U.S. 1032, 1041 (1983).

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[1] The state describes at length the virtues of formal final verdicts (BIO 5, 7-10), but these are arguments on the merits, echoing the opinions of other jurisdictions on Arkansas's side of the split as to why *federal* Double Jeopardy principles should not bar retrial of greater offenses when juries deadlock on lesser-included offenses (see Pet. 14). They are not proof of an adequate or independent state ground for the decision below; if anything, they serve to elaborate the federal issue presented to this Court.

Here the court below did just the opposite. It recognized that the question of finality turned, at least in part, on the resolution of federal questions. (Pet. App. A, 9a (citing this Court's precedent for its view that the jury forewoman's "announcement in open court" of unanimity on the capital murder and first-degree murder charges was not an acquittal).) Similarly, the court clearly understood the partial-verdict question to be a Double Jeopardy issue, acknowledging that other jurisdictions have "held that double jeopardy requires a partial verdict of acquittal as to the greater offenses if the jury is deadlocked only as to the lesser offenses." (*Id.* 13a.) Indeed, the court rested its holding on its agreement with some courts regarding this "double jeopardy" question, and its disagreement with other courts. (*Id.* 12a-14a). Not surprisingly, Arkansas's intermediate appellate court straightforwardly understands the decision in this case to be a federal Double Jeopardy holding, explaining in a recent opinion that the "*Blueford* court discussed the issue of double jeopardy arising when the jury is deadlocked and a mistrial is declared." *Basham v. State*, 2011 Ark. App. 384, at 3. In short, only the state appears to read it otherwise.

3. To the extent the state means to argue that the Arkansas Supreme Court *should not have* addressed the federal Double Jeopardy claim asserted below because it was "never raised" (BIO 6), that argument is both irrelevant and wrong.

Such a waiver argument is irrelevant because "[t]here can be no question as to the proper presentation of a federal claim when the highest state court passes on it," *Raley v. Ohio*, 360 U.S. 423, 436 (1959), as happened here. Moreover, speculation about how

a state court "might have reached the same conclusion if it had decided the question purely as a matter of state law does not create an adequate and independent state ground that relieves this Court of the necessity of considering the federal question." *United Air Lines, Inc. v. Mahin*, 410 U.S. 623, 630-31 (1973).

In any event, the state's argument is wrong. As set forth in the petition, Blueford's counsel requested a partial verdict immediately after the jury forewoman announced that the jury was "unanimous against" the murder charges. (Pet. 8.) That request was opposed by the state and refused by the court. The request for the partial verdict was, in itself, clearly sufficient to assert and preserve Blueford's double jeopardy rights. See, *e.g.*, *Stone v. Superior Court*, 646 P.2d 809, 812-13, 817 (Cal. 1982) (noting request for partial verdict but not mentioning any objection to mistrial, and explaining that the issue was "whether the double jeopardy clause requires that trial courts . . . receive a partial verdict when the jury clearly favors acquittal on a charged offense"). Unlike the state, the Arkansas Supreme Court recognized that Blueford requested a partial verdict based on the announcement of jury unanimity against the murder charges. (See Pet. App. 12a ("In essence, what [Blueford] sought was a partial verdict.").)

Just as clearly, Blueford's counsel opposed the state's counteroffer to join a mistrial, stating that she was "not asking for a mistrial at this point." (Pet. 9.) But the trial court ruled – immediately – that it would grant a mistrial if the jury came back deadlocked again, which is precisely what happened. (*Id.* 9-10.) Thereafter, Blueford timely presented Double

Jeopardy-based objections to retrial and appealed the adverse ruling on those motions to the Arkansas Supreme Court. (*Id.* 10-11.) None of this Court's precedents support the notion that Blueford was required to do more to preserve the issue.[2] The Arkansas Supreme Court's decision to address the partial-verdict and Double Jeopardy issues without any suggestion of procedural default establishes that it rejected that notion as well.

4. Even if everything the state says in its opposition is correct – and it clearly is not – its arguments apply to only one of the three grounds cited by Blueford in his petition for relief on federal Double Jeopardy grounds: the jury forewoman's announcement in open court. As Blueford set forth in the petition, two other reasons exist for barring his retrial on murder charges: (1) "the Double Jeopardy Clause bars retrial on the greater offenses because the structure of 'acquittal-first' adjudication means that the jury voted to acquit on the greater offenses before deadlocking on the lesser-included offenses"; and (2) "the Double Jeopardy Clause would bar retrial on greater offenses when [a] jury convicts on a lesser-included offense, [b] the jury is silent on the greater offense, and [c] the conviction on the lesser-included offense is overturned on appeal," and "the

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[2] The state faults Blueford for "st[anding] mute" when the mistrial was declared (BIO 6), but this ignores the preceding exchange when his request for a partial verdict was denied. In any event, "[m]ere silence is a far cry from consent or waiver," especially when a defendant has previously "provided the court with [an] alternative to mistrial." 6 Wayne R. LaFave et al., *Criminal Procedure* § 25.2(a) & n.9 (3d ed. 2007) (citation omitted).

situation when a jury deadlocks on a lesser-included offense and is silent on a greater offense" is "not distinguishable." (Pet. 20-21.)

By their very nature, these arguments presuppose the lack of a formal verdict in a traditional jury form on the greater offenses. See, *e.g.*, *Tate*, 773 A.2d at 323 (Double Jeopardy principles compel the conclusion, in a hard-transition or acquittal-first state, that "it is a valid verdict for the jury to acquit the accused of a greater offense and only thereafter to reach a deadlock on a lesser offense" and that "such a valid verdict must be accepted.").

The state's only apparent response to these separate grounds appears in a footnote at the end of its brief. It argues the cases are distinguishable because each involved an objection to a mistrial; a request for a jury poll; affidavits from jurors evidencing their intent; or a partial verdict entered of record. (BIO 10 n.2) These attempted distinctions lack merit. As to the presence of an objection, other courts have held that a request for a partial verdict – as happened here – is sufficient to establish that a formal verdict should be entered on greater charges. See *Stone*, 646 P.2d at 812-13, 817; *Tate*, 773 A.2d at 315-16 (treating defendant's request for partial verdict as having preserved his objection to mistrial).

The state's other suggested distinctions – which are presumably intended to show that other cases involved stronger evidence of juror intent – are similarly unavailing. In *Stone*, for example, there was neither a poll, nor affidavits, nor a partial verdict entered of record. 646 P.2d at 508-09. The state argues that the trial court in *Stone* made a "ruling that there is a clear expression" of not-guilty verdicts

on murder charges (BIO 8 n.1), but that ruling was based solely on the report of the foreman, 646 P.2d at 508 – and there is a substantively *identical* ruling in this case. (Pet. 10; Pet. App. B, 15a (trial court on retrial entered order in which it found "that the jury foreperson was explicit that the jury was unanimous in voting against" the murder charges).) Moreover, contrary to the state's suggestion, the cases involving affidavits uniformly rejected those statements as bases for their opinions. *Tate*, 773 A.2d at 325 n.17 (affidavits "can play no role at this level in helping to determine the crimes of which the defendant was acquitted"); *Whiteaker v. State*, 808 P.2d 270, 273 n.4 (Alaska Ct. App. 1991) (evidentiary rule "precludes consideration of the affidavits"). Instead, the cases in hard-transition or acquittal-first states have made clear that the very structure of jury deliberations establishes that a deadlock on lesser-included offenses reflects acquittal of the greater offenses. See, *e.g.*, *Tate*, 773 A.2d at 321 (instructions "prohibited [the jury] from actually considering the lesser included offenses unless and until it had arrived at a unanimous verdict of acquittal" on greater offense).[3] The

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[3] Indeed, contrary to the state's suggestion, in *Tate*, the trial court did not ask the jury to disclose the charge on which it was deadlocked. 773 A.2d at 324. Instead, deadlock on manslaughter was presumed from the jury's request for a clarification of the meaning of "recklessness." *Id.* This ambiguity – created by the trial court's refusal to make a partial-verdict inquiry – was construed in the defendant's favor, *not* against him: because "'[t]he record is not clear as to which of the included offenses the jury was considering at the time of its discharge,'" the court ruled that the new trial must be "limited to the last lesser in-

same is true based on the deliberations in this case, and the state offers no argument to the contrary.

CONCLUSION

For the foregoing reasons and for those set forth in the opening brief, the Court should grant the petition for a writ of certiorari.

Respectfully submitted,

WILLIAM R. SIMPSON, JR.
SHARON KIEL
CLINT MILLER
SIXTH JUDICIAL DISTRICT (ARKANSAS) PUBLIC DEFENDERS OFFICE
201 S. Broadway, Ste. 210
Little Rock, AR 72201
(501) 340-6120

CLIFFORD M. SLOAN
Counsel of Record
GEOFFREY M. WYATT
DAVID W. FOSTER
SKADDEN, ARPS, SLATE, MEAGHER & FLOM LLP
1440 New York Ave., NW
Washington, DC 20005
(202) 371-7000
cliff.sloan@skadden.com

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cluded offense." *Id.* at 325 (quoting *State v. Castrillo*, 566 P.2d 1146, 1151 (N.M. 1977)).

AMICUS CURIAE BRIEF

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No. 10-1320

In the
Supreme Court of the United States

ALEX BLUEFORD,
PETITIONER,
v.
STATE OF ARKANSAS,
RESPONDENT.

ON PETITION FOR A WRIT OF CERTIORARI TO THE ARKANSAS SUPREME COURT

BRIEF OF *AMICI CURIAE* CRIMINAL LAW PROFESSORS IN SUPPORT OF PETITIONER ALEX BLUEFORD (FULL LIST OF *AMICI* ON INSIDE FRONT COVER)

LISA S. BLATT
CHARLES G. CURTIS, JR.
Counsel of Record
ARNOLD & PORTER LLP
555 12th Street, NW
Washington, DC 20004
(202) 942-5000
Charles.Curtis@aporter.com

Counsel for Amici Curiae

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

Amici Curiae Criminal Law Professors:

George C. Thomas III

Michael Benza

Russell Covey

Joshua Dressler

Brian Gallini

Bennett L. Gershman

Adam Gershowitz

Lisa Griffin

Bernard E. Harcourt

Peter J. Henning

Kyron James Huigens

Jeffrey L. Kirchmeier

Alex Kreit

Arthur LaFrance

Richard A. Leo

Lawrence C. Marshall

Jonathan A. Rapping

Susan D. Rozelle

Laurent Sacharoff

Carol Steiker

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

INTEREST OF *AMICI CURIAE* 1

SUMMARY OF THE ARGUMENT 2

REASONS FOR GRANTING THE WRIT 3

I. THE DECISION BELOW CONFLICTS WITH THIS COURT'S ACQUITTAL DECISIONS. 7

A. History Demonstrates the Dangers of "Acquittal Avoidance." 10

B. This Court Repeatedly Has Held That "Acquittal Equivalents" Must Be Given Effect Under the Double Jeopardy Clause. 12

II. THE DECISION BELOW CONFLICTS WITH THIS COURT'S MISTRIAL DECISIONS. 15

III. THE DECISION BELOW CONFLICTS WITH THIS COURT'S COLLATERAL ESTOPPEL DECISIONS. 18

CONCLUSION 20

APPENDIX OF *AMICI CURIAE* 1a

TABLE OF AUTHORITIES

Page

CASES

Arizona v. Washington,
434 U.S. 497 (1978) 3, 16-18

Ashe v. Swenson,
397 U.S. 436 (1970) 1, 3, 18-19

Burks v. United States,
437 U.S. 1 (1978) 12

Bushell's Case, 6 How. St. Tr. 999
(Common Pleas 1670) 10-11

Commonwealth v. Roth,
776 N.E.2d 437 (Mass. 2002) 2

Downum v. United States,
372 U.S. 734 (1963) 17

Green v. United States,
355 U.S. 184 (1957) ..... *passim*

Harris v. Washington,
404 U.S. 55 (1971) 18

Illinois v. Somerville,
410 U.S. 458 (1973) 16-17

Ireland's Case,
7 How. St. Tr. 79 (1678) 11

People v. Hall,
324 N.E.2d 50 (Ill. App. Ct. 1975) 6

People v. Hickey,
303 N.W.2d 19 (Mich. Ct. App. 1981) 6

People v. Richardson,
184 P.3d 755 (Colo. 2008) 6-7

Price v. Georgia,
398 U.S. 323 (1970) 13-15

Renico v. Lett,
130 S. Ct. 1855 (2010) 15

Sattazahn v. Pennsylvania,
537 U.S. 101 (2003) 9

Smith v. Massachusetts,
543 U.S. 462 (2005) 8, 14

State v. Bell,
322 N.W.2d 93 (Iowa 1982) 6

State v. Booker,
293 S.E.2d 78 (N.C. 1982) 6

State v. Castrillo,
566 P.2d 1146 (N.M. 1977) 6

State v. Pugliese,
422 A.2d 1319 (N.H. 1980) 6

State v. Tate,
773 A.2d 308 (Conn. 2001) 6, 15

Stone v. Superior Court,
646 P.2d 809 (Cal. 1982) 6, 8

Turner v. Arkansas,
407 U.S. 366 (1972) 18-19

United States v. Jorn,
400 U.S. 470 (1971) 17

United States v. Martin Linen Supply Co.,
430 U.S. 564 (1977) ..... *passim*

United States v. Perez,
22 U.S. (9 Wheat.) 579 (1824) 16

United States v. Scott,
437 U.S. 82 (1978) 7, 9

Whiteaker v. State,
808 P.2d 270 (Alaska Ct. App. 1991) 6

Yeager v. United States,
129 S. Ct. 2360 (2009) 3, 19

CONSTITUTION, STATUTES, AND RULES

U.S. Const. amend. V ..... *passim*

U.S. Const. amend. XIV 1

S. Ct. R. 37.2(a) 1

OTHER AUTHORITIES

Note, *Acceptance of Partial Verdicts as a Safeguard Against Double Jeopardy*, 53 Fordham L. Rev. 889 (1985) 7

William Penn, *The Peoples Liberties Asssrted in the Tryal of William Penn and William Mead, 1670* 10

George C. Thomas III, *Double Jeopardy: The History, the Law* (1998) 8

INTEREST OF *AMICI CURIAE*[1]

Amici curiae are professors of criminal law and procedure who have studied, taught, written about, and litigated cases involving double jeopardy. *Amici* believe the Petition presents important and recurring issues of double jeopardy law over which state courts are in deep disarray. The forewoman in this case announced in open court, in response to the judge's inquiry, that the jury had voted "unanimous against" convicting Alex Blueford on the capital and first-degree murder charges. Pet. App. 19a. Jeopardy on those charges terminated at that point, and the Fifth Amendment's Double Jeopardy Clause (incorporated through the Fourteenth Amendment) bars a second prosecution of Blueford on the same charges. "For whatever else that constitutional guarantee may embrace, . . . it surely protects a man who has been acquitted from having to 'run the gantlet' a second time" on the identical charges. *Ashe v. Swenson*, 397 U.S. 436, 445-46 (1970) (internal citations omitted).

The lead *amicus*, George C. Thomas III, is a Board of Governors Professor of Law and Judge Alexander P. Waugh, Sr. Distinguished Scholar at Rutgers School of Law—Newark. He is the author of *Double Jeopardy: The History, the Law* (1998), and, with Joshua Dressler, of the casebook *Criminal Procedure: Principles, Policies and Perspectives*

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[1] Pursuant to this Court's Rule 37.2(a), counsel of record for all parties received notice at least ten days prior to the due date of *amici*'s intention to file this brief. The parties have consented to its filing; their written consents are on file with the Clerk. No counsel for a party authored this brief in whole or in part, and no party or counsel for a party made a monetary contribution intended to fund its preparation or submission. No person other than *amici* or their counsel made a monetary contribution to the preparation or submission of this brief.

(4th ed. 2010). Professor Thomas co-authored this brief with the undersigned Counsel of Record.

A list of the other *amici* who reviewed and join in this brief is included in the attached Appendix. The views expressed herein are those of the individual *amici*, not of any institutions or groups with which they may be affiliated.

SUMMARY OF THE ARGUMENT

The decision of the Arkansas Supreme Court reflects a deep division among state courts over several fundamental and recurring issues of double jeopardy. *See Commonwealth v. Roth*, 776 N.E.2d 437, 447 n.10 (Mass. 2002) (state court decisions "express diametrically opposed views on the subject"). This division demonstrates the need for review on the merits by this Court. And on those merits, the Double Jeopardy Clause bars a second prosecution of Blueford on the capital and first-degree murder charges for at least three reasons:

First, the trial judge asked the jury forewoman what the jury's "count" was on capital and first-degree murder, and the forewoman responded that the jury was "unanimous against" guilt on both charges. Pet. App. 19a. This was a "ruling" in Blueford's favor "of some or all of the factual elements of the offense[s] charged." *United States v. Martin Linen Supply Co.*, 430 U.S. 564, 571 (1977). Such a ruling is an acquittal, and this Court repeatedly has emphasized that substance governs over form and technicalities in determining when a defendant has been "acquitted." Whether the forewoman's announcement was a formal "acquittal" or an "acquittal equivalent," it was a substantive determination that the prosecution had failed to carry its burden of proof. Blueford thus may not be retried on the capital or first-degree murder charges, although he remains subject to retrial on the manslaughter and negligent homicide charges.

Second, even if the jury's "unanimous" rejection of the capital and first-degree murder charges did not constitute an "acquittal" or "acquittal equivalent," the State cannot establish the "manifest necessity" to justify a mistrial that will permit retrying Blueford on those same charges. One principle that emerges from the mistrial cases is that the State is not permitted to present a strengthened case at a later trial after having used a mistrial to avoid an acquittal—a practice this Court repeatedly has condemned as "'abhorrent,'" *Arizona v. Washington*, 434 U.S. 497, 508 (1978) (citation omitted), and that this brief will refer to as "acquittal avoidance." *Washington* also established that the trial judge is entitled to little if any deference when the mistrial results from the absence of evidence to convict, as was the case here. Indeed, one of the purposes of the Double Jeopardy Clause was to guard against the practice of English judges "exercising a power to discharge a jury whenever it appeared that the Crown's evidence would be insufficient to convict." *Id.* at 507. Here it not only "appeared" that the State's evidence was weak, the jury declared in open court that it was "unanimous against" conviction on the capital and first-degree murder charges.

Third, Blueford's jury found facts in his favor that are critical to his culpability for capital murder and first-degree murder. Under the doctrine of collateral estoppel "embodied" in the guarantee against double jeopardy, the State may not "hale [Blueford] before a new jury to litigate that issue again." *Ashe*, 397 U.S. at 442, 446; *see also Yeager v. United States*, 129 S. Ct. 2360, 2367-68 (2009) (facts "necessarily decided" by jury in voting to acquit on some counts were issue preclusive even though jury had deadlocked on other counts).

REASONS FOR GRANTING THE WRIT

The decision below is emblematic of a sharp conflict among state courts over core double jeopardy issues, and it

presents those issues in stark and unambiguous terms. Blueford's jury was instructed that it could not even "consider" lesser-included charges unless and until it had determined that the State had failed to "sustain" the capital and first-degree murder charges—that is, only "if you have a reasonable doubt of the defendant's guilt" on those greater charges. Instructions 11-15, Arkansas Supreme Court Record ["ASCR"] at 806-08. The State relied heavily on these instructions, emphasizing in closing argument that "you must first, all 12, vote that this man is not guilty of capital murder before you can ever move on." ASCR at 818. According to the State, the jury could not consider any lesser-included offenses "until all 12 of you are able to vote that you do not believe this man is guilty of capital murder." *Id.* at 818-19; *see also id.* at 848 ("[U]nless all 12 of you agree that this man's actions were not consistent with capital murder, then and only then would you go down to murder in the first degree.").

The jurors voted unanimously that they "d[id] not believe this man is guilty" of murder. *Id.* at 818-19. They voted to acquit Blueford on the capital and first-degree murder charges, but deadlocked 9-3 on the manslaughter charge. The court asked the forewoman to report the jury's "count" on each charge in open court. Pet. App. 19a. As for capital murder, the forewoman announced the jury "was unanimous against that. No." *Id.* As for first-degree murder, the forewoman announced that the jury "was unanimous against that" too. *Id.* The forewoman then reported the jury was deadlocked on manslaughter and had not yet considered negligent homicide. *See id.* at 19a-20a. She emphasized that the jury had not yet considered the latter count because "[w]e couldn't get past the manslaughter," and the jurors understood, pursuant to the judge's instructions, that they were not to consider lesser offenses until they had acquitted on the greater ones—they "were supposed to go one at a time." *Id.* at 20a.

The court ordered the jury to resume its deliberations. *Id.* at 21a-22a. Blueford's counsel moved "that the jury be given verdict forms and that they fill out verdict forms for those counts that they have reached a verdict on"—capital and first-degree murder. *Id.* at 23a. The court denied that motion and, after the jury was unable to resolve its impasse over the manslaughter count, declared a mistrial—not only as to the lesser offenses, but also on the capital and first-degree murder counts as well. *Id.* at 24a-26a.

The State of Arkansas is now seeking to retry Blueford for murder all over again, despite the first jury declaring in open court that it was "unanimous against" convicting him of that crime. On interlocutory appeal, the Arkansas Supreme Court held that the State could retry Blueford for capital and first-degree murder because "neither the giving of those instructions nor the forewoman's announcement in open court that the jury found Appellant not guilty on those two charges negates the bedrock principle of law that a judgment is not valid until entered of record." Pet. App. 10a. The court reasoned that the jurors' unanimous vote announced in open court was never reduced to a written verdict that was then "entered of record." *Id.* It was therefore "axiomatic" that the jurors' decision was a nullity and did not terminate Blueford's jeopardy. *Id.* at 9a.

The Arkansas Supreme Court acknowledged that "[j]urisdictions are split on the issue of partial verdicts," and that many state courts and legislatures have decided "that double jeopardy requires a partial verdict of acquittal as to the greater offenses if the jury is deadlocked only as to the lesser offenses." *Id.* at 12a-13a (citing California, Connecticut, New Hampshire, and Alaska decisions). But the court was "simply unpersuaded by the underlying rationale" of this position, and declined to depart from the "bedrock principle" requiring formal "entry of record" before jeopardy terminates. *Id.* at 10a, 13a. As the court discussed, other States agree with Arkansas that a jury's

substantive determination of innocence does not terminate jeopardy unless and until it is reduced to writing in a "final verdict" that is "entered of record." *Id.* at 12a-13a.[2]

Contrary to the Arkansas Supreme Court's decision, other state supreme courts have recognized that the Double Jeopardy Clause requires judges to give effect to final and unanimous jury decisions that the defendant is substantively innocent of certain charges. In those cases, the State may not reprosecute the defendant through the simple expedient of seeking a mistrial after the jury has declared its resolution of the charges in open court but before its judgment has been "entered of record."[3] Other states have adopted, either through legislation or rulemaking, procedures that allow for judgments of partial acquittal in cases like these.[4]

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[2] *See, e.g.*, *People v. Richardson*, 184 P.3d 755, 764 (Colo. 2008) (en banc); *People v. Hall*, 324 N.E.2d 50, 52 (Ill. App. Ct. 1975) (jeopardy only terminates upon jury's "formal return of its verdict to the court"); *State v. Bell*, 322 N.W.2d 93, 95-96 (Iowa 1982); *People v. Hickey*, 303 N.W.2d 19, 21 (Mich. Ct. App. 1981) ("the weight of final adjudication should not be given to any jury action that is not returned in a final verdict"); *State v. Booker*, 293 S.E.2d 78, 80 (N.C. 1982) (there must be "a *final verdict* before there can be an implied acquittal").

[3] *See, e.g.*, *Whiteaker v. State*, 808 P.2d 270, 273-78 (Alaska Ct. App. 1991); *Stone v. Superior Court*, 646 P.2d 809, 816-17 (Cal. 1982); *State v. Tate*, 773 A.2d 308, 319-25 (Conn. 2001); *State v. Pugliese*, 422 A.2d 1319, 1320-22 (N.H. 1980) (per curiam); *State v. Castrillo*, 566 P.2d 1146, 1151-52 (N.M. 1977); *see also Richardson*, 184 P.3d at 766 (Martinez, J., dissenting) (discussing caselaw in fourteen states requiring acceptance of partial verdicts).

[4] *See, e.g.*, *Richardson*, 184 P.3d at 763 n.6 (discussing states with "rules of criminal procedure that expressly require trial courts to poll deadlocked juries and accept partial verdicts"); *id.* at 766 (Martinez, J., dissenting) (discussing states that have

This Court should grant *certiorari* to resolve this split on the issue of partial verdicts. On the merits, the judgment of the Arkansas Supreme Court conflicts with this Court's double jeopardy decisions in at least three fundamental respects: it conflicts with this Court's acquittal decisions, its mistrial decisions, and its collateral estoppel decisions. We examine each conflict in turn.

I. THE DECISION BELOW CONFLICTS WITH THIS COURT'S ACQUITTAL DECISIONS.

"[T]he law attaches particular significance to an acquittal." *United States v. Scott*, 437 U.S. 82, 91 (1978). It is a "deeply entrenched principle of our criminal law that once a person has been acquitted of an offense he cannot be prosecuted again on the same charge." *Green v. United States*, 355 U.S. 184, 192 (1957). Although a defendant may be retried in many instances after avoiding a conviction or obtaining a reversal on appeal, that is not the case after an "acquittal," which "terminates" jeopardy and bars any further jeopardy on the same criminal charges. *Id.*

This Court has long held that what constitutes an "acquittal" is a matter of substance, not form:

> "[W]e have emphasized that what constitutes an 'acquittal' is not to be controlled by the form of the judge's action. Rather, we must determine whether the ruling of the judge, whatever its label, actually represents a resolution, correct or not, of some or all of the factual elements of the offense charged." *Martin Linen*, 430 U.S. at 571 (internal citations omitted).

"incorporated" this safeguard "into their rules, statutes, and jury instructions"); *see also* Note, *Acceptance of Partial Verdicts as a Safeguard Against Double Jeopardy*, 53 Fordham L. Rev. 889, 890 n.6 (1985).

Though *Martin Linen* involved a ruling by a judge, a jury acquittal is equally final. Thus, regardless of "nomenclature" or whether other counts remain pending, a defendant is "acquitted" on a count whenever there has been "a *substantive determination* that the prosecution has failed to carry its burden," whether through "an acquittal by jury verdict" or "a court-decreed acquittal." *Smith v. Massachusetts*, 543 U.S. 462, 467-69 (2005) (emphasis added). Jeopardy terminates in these circumstances whether or not there has been a "formal" verdict or entry of judgment. What matters is whether there has been an "acquittal equivalent"—a *substantive determination* "that resolves the blameworthiness issue in favor of the defendant."[5]

The Blueford jury's pronouncement in open court, in response to the judge's request for its "count" on each charge, that it was "unanimous against" capital and first-degree murder was an acquittal or acquittal equivalent. It represented "a substantive determination" by the jury "that the prosecution ha[d] failed to carry its burden" on these charges. *Smith*, 543 U.S. at 468. The jury forewoman's response—"That was unanimous against that. No."—resolved in Blueford's favor "some or all of the factual elements of the offense[s] charged." *Martin Linen*, 430 U.S. at 571. The judge's instructions, prosecutor's closing argument, and judge's colloquy with the forewoman all made clear that the jury understood that it had to decide unanimously to acquit Blueford of the greater-included offenses before considering the lesser-included ones. *See* p.

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[5] George C. Thomas III, *Double Jeopardy: The History, the Law* 230-31 (1998); *see id.* at 229-250 (discussing "acquittal equivalence" and "acquittal avoidance"); *see also Stone*, 646 P.2d at 814 ("It is plain . . . that if we recognize the jury's actions to be the equivalent of an acquittal of murder, defendant cannot be retried for either degree of that offense.").

4 *supra*. The jury's substantive determination of Blueford's innocence on the murder charges was, at the very least, an acquittal equivalent.[6]

Consider several variations on the *Blueford* facts that underscore why the jury's action in this case must be construed as operating to terminate jeopardy on the capital and first-degree murder counts. Suppose the jury forewoman stands and announces that the jury is "unanimous against" all four counts, and the judge angrily orders that the jurors be held in confinement until they change their minds. Or, to pose a less extreme variation, suppose the jurors forget to fill out the verdict form, or fail to complete the form because it is confusingly worded. But the forewoman announces in open court that the jury is "unanimous against" conviction on *any* of the charges. At this point the judge engages in "acquittal avoidance"—she declares a mistrial because she is convinced the defendant is guilty and that the prosecution should have another shot at conviction, having learned from its mistakes in the first trial. Or, to offer one more variation, suppose the jury properly fills in the verdict form and delivers it to the judge, who, appalled by the outcome, promptly throws the verdict form away rather than having it "entered of record" and instead declares a mistrial.

---

[6] This Court has applied acquittal equivalence in determining that certain kinds of case outcomes are not the equivalent of an "acquittal" and thus not a jeopardy bar to further proceedings. *See, e.g., Sattazahn v. Pennsylvania*, 537 U.S. 101, 106-07, 109 (2003) ("the touchstone for double jeopardy protection . . . is whether there has been an 'acquittal'"—a resolution of "guilt or innocence"; life sentence for capital murder did *not* constitute an "acquittal" barring subsequent resentencing to death for the convicted offense); *United States v. Scott*, 437 U.S. at 94-101 (defense-requested dismissal on the ground of pre-indictment delay is *not* equivalent to an "acquittal" and thus not a jeopardy bar to a new indictment).

We cannot imagine a persuasive argument that any of these scenarios would be anything other than a "ruling" by the jury in the defendant's favor "of some or all of the factual elements of the offense charged." *Martin Linen*, 430 U.S. at 571. Can it be true that the lack of a fully completed verdict form, or the apparent refusal of the judge to accept the jury's acquittals, would render any of these jury actions any less a "ruling" on the substantive merits in the defendant's favor? The jury's substantive ruling in Blueford's case is not different in any material way from these variations.

A. History Demonstrates the Dangers of "Acquittal Avoidance."

History supports the argument that the judge cannot engage in "acquittal avoidance," but must accept an acquittal with which he does not agree. In *William Penn's Case* in 1670, the judge refused to accept the jury's not guilty verdict and even threatened to cut the throat of the jury foreman. The judge also had Penn chained to the floor when he argued that the refusal to accept the jury verdict denied him "Justice." The judge ordered the jury locked up for two days "without Meat, Drink, Fire, and Tobacco," but the jury clung to its not guilty verdict. The judge ultimately accepted the acquittal but ordered the jurors imprisoned until they paid a harsh fine. See William Penn, *The Peoples Liberties Asssrted in the Tryal of William Penn and William Mead, 1670.*

The jury foreman, Bushell, petitioned for a writ of habeas corpus. In *Bushell's Case*, 6 How. St. Tr. 999 (Common Pleas 1670), the ten judges on the Court of Common Pleas unanimously held that a trial court lacked the authority to punish the jury on account of its verdict. Today, *Bushell's Case* is regarded as a watershed case that established the jury's independence from the court and thus elevated jury trial to a fundamental right. While this is true

enough, it misses the deeper point, which is *why* a jury verdict of acquittal cannot be impeached. Chief Justice Vaughan's opinion noted that if judges could tell the jury how to decide a case, there would be no point in having juries at all. Vaughan could have stopped there but he made another, more fundamental, point: a jury finding that the evidence is not "full and manifest" is unimpeachable *because it is true*. *Id.* at 1006. Just as two barristers could "deduce contrary and opposite conclusions out of the same case in law . . . two men [could] infer distinct conclusions from the same testimony," and thus no reason exists to prefer the court's view over the jury's. *Id.*

When the forewoman of Blueford's jury declared in open court, in response to the judge's call for the "count," that the jury was "unanimous against" the capital and first-degree murder charges, those words represented the *truth* about Blueford's substantive innocence on those charges. It did not matter that the verdict form was not filled in or "entered of record." And the trial judge lacked the authority at that point to ignore the jury's acquittals by declaring a mistrial on those counts before the jury was allowed to return a partial verdict of acquittal. *See* Part II *infra*.[7]

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[7] For other lessons from history, consider *Ireland's Case*, 7 How. St. Tr. 79 (1678). Five defendants were tried for conspiring to murder Charles II. At the close of the evidence, the judge advised the jury that the Crown had presented insufficient evidence to sustain the charges against two of the defendants. But instead of allowing these two defendants to go free, the judge returned them to prison "until more proof may come in." *Id.* at 120. They were later retried, convicted, and executed; their plea of double jeopardy was rejected "because there was no condemnation or acquittal" of them in the first trial. *Id.* at 316-17.

B. This Court Repeatedly Has Held That "Acquittal Equivalents" Must Be Given Effect Under the Double Jeopardy Clause.

This Court's double jeopardy jurisprudence embodies the lessons of history. The Court repeatedly has emphasized that a ruling that amounts to an acquittal must be treated as such even though no verdict form (let alone one that had been "entered of record") showed the words "not guilty." In *Burks v. United States*, 437 U.S. 1 (1978), for example, the jury convicted, the judge refused to grant a new trial on the ground of insufficient evidence, and Burks appealed. The Court of Appeals agreed with Burks that the evidence was insufficient to convict and remanded to the district court to determine whether to order a new trial or enter an acquittal.

In a unanimous opinion by Chief Justice Burger (Justice Blackmun not participating), this Court held that the Double Jeopardy Clause precluded a new trial. Relying in part on *Martin Linen*, the Court held that the Court of Appeals' judgment was "a resolution, correct or not, of some or all of the factual elements of the offense charged." *Id.* at 10. This Court emphasized that "[t]he Double Jeopardy Clause forbids a second trial for the purpose of affording the prosecution another opportunity to supply evidence which it failed to muster in the first proceeding. This is central to the objective of the prohibition against successive trials." *Id.* at 11. Even though no jury form stated "not guilty," the Court looked to the *substance* of what had happened and refused to let the State have another bite at the apple.

Burks also relied, in part, on *Green v. United States*, 355 U.S. 184 (1957), another case in which there existed no completed jury form with a "not guilty" verdict on it. Green was charged with arson and first-degree murder. The judge instructed the jury that it could find Green guilty of second-degree murder as a necessarily included offense of first-degree murder. The jury returned a guilty verdict of second-

degree murder and arson, but "[i]ts verdict was silent" on the first-degree murder charge. *Id.* at 186. After Green's convictions were reversed on appeal, the government sought to try him again for first-degree murder. This Court held that another trial on that charge would violate the Double Jeopardy Clause:

> "Green was in direct peril of being convicted and punished for first degree murder at his first trial. He was forced to run the gantlet once on that charge and the jury refused to convict him. When given the choice between finding him guilty of either first or second degree murder it chose the latter." *Id.* at 190.

This Court re-affirmed and strengthened *Green* in *Price v. Georgia*, 398 U.S. 323 (1970), which unanimously held that a conviction of a lesser-included offense, manslaughter, barred a second trial for the greater offense, murder. As in *Green*, the jury verdict was silent on the greater offense. *Price* made plain that the silence on the greater charge was meaningless: "[T]his Court has consistently refused to rule that jeopardy for an offense continues after an acquittal, ***whether that acquittal is express or implied*** by a conviction on a lesser included offense when the jury was given a full opportunity to return a verdict on the greater charge." *Id.* at 329 (emphasis added).

Blueford's case is even more compelling than *Green* or *Price*. Rather than "implied" innocence through jury silence on the greater charge, here the jury forewoman announced that the jury "was unanimous against" both capital and first-degree murder. But if that declaration is ignored, Blueford's case is indistinguishable from *Green* and *Price*. The Blueford jury, like the jury in *Price*, had a "full opportunity to return a verdict on the greater charge," *id.*, and determined, in the words of the jury instructions, that the State had failed to "sustain" those charges and that

"reasonable doubt" remained, ASCR at 806-08 (quoting jury instructions). Because a jury already has "refused to convict" on these charges, *Green*, 355 U.S. at 190, the Double Jeopardy Clause bars a retrial on either capital or first-degree murder.

Smith v. Massachusetts, 543 U.S. 462 (2005), further supports treating the jury's actions here as an "acquittal." After the prosecution rested, the defense moved for acquittal on the firearm-possession count of a multi-count indictment. The trial judge orally "granted the motion. . . . [and] marked petitioner's motion with the handwritten endorsement 'Filed and after hearing, Allowed,' and the allowance of the motion was entered on the docket." *Id.* at 465. At the close of the trial, the prosecutor asked the judge to reverse her ruling on the motion for acquittal. The judge "agreed" to reverse her ruling and announced that she was "allowing the firearm-possession count to go to the jury." *Id.*

This Court held that the mid-trial ruling was an "acquittal" even though trial continued on other counts. "It is of no moment that jeopardy continued on the two assault charges, for which the jury remained empaneled. Double-jeopardy analysis focuses on the individual 'offence' charged, and our cases establish that *jeopardy may terminate on some counts even as it continues on others*." *Id.* at 469 n.3 (emphasis added, citations omitted).

In *Smith*, substance triumphed over form once again, as it should in Blueford's case. What happened here was a unanimous pronouncement by the jury in open court that Blueford is substantively innocent of capital and first-degree murder. That judgment should be respected as the acquittal it is.

Unlike the practice in Arkansas, juries in some states are instructed that they may move back and forth between the issues and varying degrees of guilt until they have agreed upon an outcome. The issues in "soft transition" states like

these may be different and more difficult than in "hard transition" states like Arkansas, where the jury is required to find the defendant not guilty of the greater offenses before being allowed to consider lesser-included charges. *See, e.g.*, *State v. Tate*, 773 A.2d 308, 321-22 (Conn. 2001) (concerns about "tentative nature" of jury's decisions in "soft transition" states "do not surface" in hard-transition states, which "require[] the jury to reach a partial verdict" on the greater charges before turning to the lesser-included offenses). Nor does this case present a situation in which the trial court in the first case took pains to prevent the jury from disclosing any of its deliberations or votes on the various charges—another relevant (though not dispositive) factor.[8]

Where a jury has expressly been instructed that it may only consider lesser-included offenses if it has first determined that the State has failed to "sustain" its burden of proof on the greater offenses, *see* ASCR at 806-08, the very fact of jury deliberation on a lesser-included offense makes the case equivalent to a conviction of a lesser-included offense as in *Green* and *Price* and is, without more, a substantive acquittal on the greater charges. Where that has occurred, jeopardy has terminated on those charges.

II. THE DECISION BELOW CONFLICTS WITH THIS COURT'S MISTRIAL DECISIONS.

Green relied on a second rationale for holding that a retrial for first-degree murder was barred by the Double Jeopardy Clause after conviction of a lesser-included

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[8] Compare *Renico v. Lett*, 130 S. Ct. 1855 (2010), allowing a retrial after a mistrial where the trial court had told the deadlocked jury that "I don't want to know what your verdict might be, or how the split is, or any of that. Thank you. Okay? Are you going to reach a unanimous verdict, or not?" *Id.* at 1861. When the foreperson answered in the negative, the judge declared a mistrial. *Id.*

offense—that "the jury was dismissed without returning any express verdict on that charge and without Green's consent." 355 U.S. at 191. To be sure, mistrials based on hung juries are a long-established exception permitting the State to re-prosecute when the first jury has had a chance to convict and failed to do so. *See United States v. Perez*, 22 U.S. (9 Wheat.) 579, 580 (1824). Blueford does not dispute that the mistrial on the lesser charges permits retrial on them.

Justice Story's opinion in *Perez* coined the term "manifest necessity" to explain why a retrial is often permissible after a hung jury. *Id.* In *Arizona v. Washington*, 434 U.S. 497 (1978), this Court interpreted its "manifest necessity" precedents as establishing "that there are degrees of necessity and we require a 'high degree' before concluding that a mistrial is appropriate." *Id.* at 506. The "degrees of necessity" are on a spectrum:

> "At one extreme are cases in which a prosecutor requests a mistrial in order to buttress weaknesses in his evidence. Although there was a time when English judges served the Stuart monarchs by exercising a power to discharge a jury whenever it appeared that the Crown's evidence would be insufficient to convict, the prohibition against double jeopardy as it evolved in this country was plainly intended to condemn this 'abhorrent' practice." *Id.* at 507-08 (citation omitted).

This Court repeatedly has condemned the practice of acquittal avoidance, emphasizing that this strategy cannot provide the "manifest necessity" needed to end the first trial and justify a new trial on the same charges. *See, e.g., Illinois v. Somerville*, 410 U.S. 458, 469 (1973) (Double Jeopardy Clause forbids use of mistrial "as a post-jeopardy continuance to allow the prosecution an opportunity to

strengthen its case"); *United States v. Jorn*, 400 U.S. 470, 486 (1971) (plurality op. of Harlan, J.) ("lack of preparedness by the Government to continue the trial directly implicates policies underpinning . . . the double jeopardy provision"); *Downum v. United States*, 372 U.S. 734, 737 (1963) ("The situation presented is simply one where the district attorney entered upon the trial of the case without sufficient evidence to convict. This does not take the case out of the rule with reference to former jeopardy.") (citation and internal quotation marks omitted).

The mistrial on the capital and first-degree murder counts in Blueford's case presents an even *more* "extreme" and "abhorrent" situation than envisioned in *Washington* and the other cases cited above. Those cases addressed situations in which judges and prosecutors were simply *predicting* that the jury might acquit and acted to avoid the *risk* of such an outcome. Here the jury openly announced that it was "unanimous against" guilt on the murder charges—that it "refused to convict" on those charges. *Green*, 355 U.S. at 190. The prosecutor then sought and obtained a mistrial that will allow him to "buttress weaknesses in his evidence" and "strengthen [his] case" before a new jury on these identical charges. *Washington*, 434 U.S. at 507; *Somerville*, 410 U.S. at 469.

The Arkansas Supreme Court in effect held that it was manifestly necessary for the trial judge to grant a mistrial on all counts. But it was not necessary in any meaning of that term. The jury was not hung on all counts. It was "unanimous against" guilt on capital and first-degree murder.

Where a State like Arkansas requires a unanimous jury decision to acquit on a greater-included count before the jury can even consider lesser-included counts, the State's failure to accept partial verdicts in appropriate cases cannot constitute the "manifest necessity" for a mistrial that permits

retrial on the identical charges on which the jury voted to acquit. Following *Washington*, no retrial should be permitted on those charges. We do not want to return to English law under the Stuart monarchs.

III. THE DECISION BELOW CONFLICTS WITH THIS COURT'S COLLATERAL ESTOPPEL DECISIONS.

Arkansas also is collaterally estopped from retrying Blueford on the capital and first-degree murder issues. "[C]ollateral estoppel in criminal trials is an integral part of the protection against double jeopardy . . . ." *Harris v. Washington*, 404 U.S. 55, 56 (1971). In *Ashe v. Swenson*, 397 U.S. 436 (1970), several masked men robbed six poker players. Ashe was charged with robbing one player, and the jury acquitted him. This Court held that this acquittal barred a trial for the robbery of another poker player. The Court conceded that the robbery of each player was a different offense, but Ashe had argued in the first trial that he had no connection to the robbery. Thus, when the jury acquitted, it necessarily found that Ashe had not been part of the robbery—a fact critical to culpability that the State would try to prove again in a second trial. The question, this Court said, was "whether, after a jury determined by its verdict that the petitioner was not one of the robbers, the State could constitutionally hale him before a new jury to litigate that issue again." *Id.* at 446. The answer was "no."

Blueford makes an equally compelling collateral estoppel argument. Notice that Ashe, like Blueford, lacked a formal verdict of not guilty on the pending charge. What Ashe had was a *finding* by a jury that he was not one of the robbers. What Blueford has here is a *finding* by the jury that the State did not prove the facts critical to conviction on capital and first-degree murder. The State may not "hale him before a new jury to litigate that issue again." *Id.*; *see also Turner v. Arkansas*, 407 U.S. 366, 369 (1972) (jury's general

acquittal of murder implicitly but "logical[ly]" determined that defendant had not been "present at the scene of the murder and robbery"; collateral estoppel prevented subsequent prosecution on any charge dependent on defendant's presence at the scene).

That the State properly got a mistrial on the lesser counts changes nothing in the *Ashe* calculus, as *Yeager v. United States*, 129 S. Ct. 2360 (2009), makes plain. *Yeager*, unlike *Ashe*, "involve[d] an acquittal on some counts and a mistrial declared on others," but "[t]he reasoning in *Ashe* is nevertheless controlling because, for double jeopardy purposes, the jury's inability to reach a verdict on [some] counts was a nonevent and the acquittals on [other] counts are entitled to the same effect as Ashe's acquittal." *Id.* at 2367; *see also id.* at 2368-69 ("the consideration of hung counts has no place in the issue-preclusion analysis" of the effects of the *acquitted* counts; "a jury verdict that necessarily decided [a particular] issue in [defendant's] favor protects him from reprosecution for any charge for which that is an essential element").

Although the dissenting Justices in *Yeager* disagreed with the Court that the acquittals necessarily resolved the hung counts in the defendant's favor, *see id.* at 2374-75 (Alito, J., dissenting), no one suggested that Yeager could be retried on the *acquitted* counts. Yet that is what is happening to Blueford. Under *Yeager*, the mistrial on the manslaughter count in Blueford's case is irrelevant to the collateral estoppel effects of the jury's unanimous determination of his innocence on the more serious charges. The Arkansas courts treated the mistrial as the event that determines whether the acquittals are valid, precisely the opposite of what *Yeager* requires. The facts underlying capital and first-degree murder have been "necessarily decided" in Blueford's favor, *id.* at 2366, and the Double Jeopardy Clause forbids re-litigating them.

CONCLUSION

The petition for a writ of *certiorari* should be granted.

Respectfully submitted,

LISA S. BLATT
CHARLES G. CURTIS, JR.
Counsel of Record
ARNOLD & PORTER LLP
555 12th Street, NW
Washington, DC 20004
(202) 942-5000
Charles.Curtis@aporter.com

Counsel for Amici Curiae

APPENDIX

APPENDIX OF *AMICI CURIAE*

George C. Thomas III
Board of Governors Professor of Law and Judge Alexander P. Waugh, Sr. Distinguished Scholar
Rutgers School of Law—Newark

Michael Benza
Visiting Associate Professor of Law
Case Western Reserve University School of Law

Russell Covey
Associate Professor
Georgia State University College of Law

Joshua Dressler
Frank R. Strong Chair in Law
Michael E. Moritz College of Law, The Ohio State University

Brian Gallini
Associate Professor of Law
University of Arkansas School of Law

Adam Gershowitz
Associate Professor of Law
University of Houston Law Center

Bennett L. Gershman
Professor of Law
Pace Law School, Pace University

Lissa Griffin
Professor of Law
Pace Law School, Pace University

Bernard E. Harcourt
Professor and Chair, Department of Political Science
and Julius Kreeger Professor of Law
The University of Chicago

Peter J. Henning
Professor of Law
Wayne State University Law School

Kyron James Huigens
Professor of Law
Benjamin N. Cardozo School of Law

Jeffrey L. Kirchmeier
Professor of Law
City University of New York School of Law

Alex Kreit
Associate Professor and Director of the Center for
Law & Social Justice
Thomas Jefferson School of Law

Arthur LaFrance
Visiting Professor of Law
University of Arizona James E. Rogers College of Law

Richard A. Leo
Associate Professor of Law
University of San Francisco

Lawrence C. Marshall
Professor of Law, Associate Dean for Clinical Education,
and David & Stephanie Mills Director of the
Mills Legal Clinic
Stanford Law School

Jonathan A. Rapping
Associate Professor of Law and Director of the Honors Program in Criminal Justice
Atlanta's John Marshall Law School

Susan D. Rozelle
Professor of Law
Stetson University College of Law

Laurent Sacharoff
Assistant Professor of Law
University of Arkansas School of Law-Fayetteville

Carol Steiker
Howard J. and Katherine W. Aibel Professor of Law
Harvard Law School

AMICUS CURIAE BRIEF

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Supreme Court of the United States

ALEX BLUEFORD,
Petitioner,

v.

STATE OF ARKANSAS,
Respondent.

On Petition for a Writ of Certiorari to the Arkansas Supreme Court

BRIEF OF CONSTITUTIONAL ACCOUNTABILITY CENTER AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

DOUGLAS T. KENDALL
ELIZABETH B. WYDRA*
**Counsel of Record*
DAVID H. GANS
CONSTITUTIONAL
ACCOUNTABILITY CENTER
1200 18th St., NW, Suite 1002
Washington, D.C. 20036
(202) 296-6889
elizabeth@theusconstitution.org

Counsel for Amicus Curiae

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

INTEREST OF *AMICUS CURIAE* 1

SUMMARY OF ARGUMENT 2

ARGUMENT 4

THE COURT SHOULD GRANT REVIEW TO CLARIFY THE SCOPE OF THE DOUBLE JEOPARDY CLAUSE'S PROTECTION OF JURY ACQUITTALS. 4

A. The Text and History of the Fifth Amendment's Double Jeopardy Clause Prohibit Retrial After Jury Acquittal. 7

B. The Authority of Courts to Declare a Mistrial Must Be Exercised Consistent With the Fifth Amendment's Protection of Jury Acquittals. 12

CONCLUSION 14

TABLE OF AUTHORITIES

Page

Cases

Benton v. Maryland,
395 U.S. 784 (1969) 11

Burks v. United States,
437 U.S. 1 (1978) 11

Commonwealth v. Cook,
6 Serg. & Rawle 577 (Pa. 1822) 14

Commonwealth v. Roth,
776 N.E.2d 437 (Mass. 2002) 4

Green v. United States,
355 U.S. 184 (1957) 6, 7, 11, 12, 13

Malloy v. Hogan,
378 U.S. 1 (1964) 11

McDonald v. City of Chicago,
130 S. Ct. 3020 (2010) 10, 11

Monge v. California,
524 U.S. 721 (1998) 12

People v. Hall,
324 N.E.2d 50 (Ill. App. Ct. 1975)..... 4

People v. Hickey,
303 N.W.2d 19 (Mich. Ct. App. 1981) 4

People v. Richardson,
184 P.3d. 755 (Colo. 2008)..... 4

TABLE OF AUTHORITIES—continued

Page

Renico v. Lett,
130 S. Ct. 1855 (2010) 13

State v. Bell,
322 N.W.2d 93 (Iowa 1982) 4

State v. Booker,
293 S.E.2d 78 (N.C. 1982) 4

State v. Fielder,
118 P.3d 752 (N.M. Ct. App. 2005) 4

State v. McKay,
535 P.2d 945 (Kan. 1975) 4

State v. Pugliese,
422 A.2d 1319 (N.H. 1980) 4

State v. Tate,
773 A.2d 308 (Conn. 2001) 4

Stone v. Superior Court,
646 P.2d 809 (Cal. 1982) 4

United States v. Ball,
163 U.S. 662 (1896) 12

United States v. Gibert,
25 F. Cas. 1287 (C.C.D. Mass. 1834) 7

United States v. Martin Linen Supply Co.,
430 U.S. 564 (1977) 7, 12

TABLE OF AUTHORITIES—continued

Page

United States v. Perez,
22 U.S. (9 Wheat.) 579 (1824) 12-13

United States v. Wilson,
420 U.S. 332 (1975) 10, 11

Whiteaker v. State,
808 P.2d 270 (Alaska Ct. App. 1991) 4

Constitutional Provisions, Rules and Legislative Materials

U.S. CONST. amend. V 7

Supreme Court Rule 10(c) 3

Annals of Congress, 1st Cong., 1st Sess. (1789).. 9, 10

Cong. Globe, 39th Cong., 1st Sess. 2765 (1866) 10

Books, Articles, and Other Materials

AKHIL REED AMAR, THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION (1998) 9

WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 8

JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES (1833) 7-8, 9, 13

INTEREST OF *AMICUS CURIAE*[1]

Constitutional Accountability Center (CAC) is a think tank, law firm and action center dedicated to fulfilling the progressive promise of our Constitution's text and history. CAC works in our courts, through our government, and with legal scholars to improve understanding of the Constitution and to preserve the rights, freedoms and structural safeguards it guarantees.

This case raises the question whether the Double Jeopardy Clause of the Fifth Amendment, applied to the states through the Fourteenth Amendment, permits the government to subject a criminal defendant to a second trial for the same serious offences a jury had acquitted him of, simply because the jury had deadlocked on a lesser-included offense. As an organization dedicated to the Constitution's text and history, CAC has an interest in safeguarding the right not to be placed twice in jeopardy of life or limb for the same crime and ensuring the integrity of the jury as a constitutional bulwark of liberty.

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[1] Counsel for all parties received notice at least 10 days prior to the due date of *amicus's* intention to file this brief; all parties have consented to the filing of this brief. Under Rule 37.6 of the Rules of this Court, *amicus* states that no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus* or its counsel made a monetary contribution to its preparation or submission.

SUMMARY OF ARGUMENT

The Petition for a Writ of Certiorari should be granted in this case to resolve a troubling split among state courts concerning the interpretation of the Fifth Amendment's Double Jeopardy Clause. Below, the Arkansas Supreme Court held that the Double Jeopardy Clause did not prevent the state from retrying Alex Blueford on charges that the jury in his first trial had unanimously rejected, relying on the fact that the jury had deadlocked on a lesser-included offense. The state court refused to apply the Double Jeopardy Clause to the jury's acquittal on the two more serious charges, even though, under Arkansas law, the jury could not have considered the lesser-included offense without first acquitting Blueford of the more serious offenses. This ruling conflicts with the judgment of five other state courts.

The ruling of the Arkansas Supreme Court not only conflicts with the opinions of other state courts, it is manifestly inconsistent with the text and history of the Double Jeopardy Clause. The Double Jeopardy Clause, like many aspects of the Bill of Rights, has its origins in English common law. English common-law precedent, this Court's jurisprudence, and the debates over the framing of the Bill of Rights plainly establish that the Double Jeopardy Clause prohibits the government, following acquittal by a jury, from subjecting a defendant to a second trial or prosecution for the same crime. There is nothing in the Clause's text or history to suggest that this fundamental protection against government overreaching is

inapplicable to partial verdicts or the functional equivalent of a partial verdict, as in this case. Indeed, this Court's protection of "implicit acquittals" suggests that it is of no constitutional moment that the jury's acquittal in this case was not reflected in any order or judgment.

Had the capital murder and first-degree murder offenses been the only charges sent to the jury at Blueford's criminal trial, there could be no serious question that, after the jury's announcement in open court that they had voted unanimously to acquit Blueford on those two charges, the Double Jeopardy Clause would bar the state from retrying him on those offenses. The result should not be any different simply because, after the jurors told the trial court that they voted unanimously to acquit Blueford of the more serious charges against him, the jury deadlocked on the lesser-included offense of manslaughter. While Arkansas is surely free to retry Blueford on the two lesser-included charges that the jury did not resolve—manslaughter and negligent homicide—the Double Jeopardy Clause forbids a second trial on the more serious charges that were unanimously rejected by the jury.

To resolve these important constitutional questions about the interpretation of the Double Jeopardy Clause, about which the courts below are divided, *amicus* urges the Court to grant the Petition for Certiorari. Review is necessary here because the court below "has decided an important question of federal law that has not been, but should be, settled by this Court." S. Ct. Rule 10(c).

ARGUMENT

THE COURT SHOULD GRANT REVIEW TO CLARIFY THE SCOPE OF THE DOUBLE JEOPARDY CLAUSE'S PROTECTION OF JURY ACQUITTALS.

The Petition for a Writ of Certiorari in this case presents an important, recurring, and unresolved question concerning the meaning of the Fifth Amendment's constitutional prohibition on double jeopardy that has divided the state courts: whether the Double Jeopardy Clause prohibits a defendant from being subjected to a second trial for a serious offense when the jury acquitted him of that offense, but deadlocked on a lesser-included offense. *See* Pet. at 13-18 (setting forth split among state courts).[2]

In complex criminal cases involving greater and lesser-included offenses, like Alex Blueford's,

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[2] *Compare* App. to Pet. for Cert. at 12a-14a; *People v. Richardson*, 184 P.3d. 755 (Colo. 2008) (en banc); *State v. Booker*, 293 S.E.2d 78 (N.C. 1982); *State v. Bell*, 322 N.W.2d 93 (Iowa 1982); *People v. Hickey*, 303 N.W.2d 19 (Mich. Ct. App. 1981); *State v. McKay*, 535 P.2d 945 (Kan. 1975); *People v. Hall*, 324 N.E.2d 50 (Ill. App. Ct. 1975) (all rejecting double jeopardy claim) *with State v. Fielder*, 118 P.3d 752 (N.M. Ct. App. 2005); *State v. Tate*, 773 A.2d 308 (Conn. 2001); *Whiteaker v. State*, 808 P.2d 270 (Alaska Ct. App. 1991); *Stone v. Superior Court*, 646 P.2d 809, 816-17 (Cal. 1982); *State v. Pugliese*, 422 A.2d 1319 (N.H. 1980) (all finding double jeopardy violation). *See also Commonwealth v. Roth*, 776 N.E.2d 437 (Mass. 2002) (finding double jeopardy violation but holding that it was error for the trial court to take a partial verdict on greater and lesser-included offenses).

Arkansas law instructs juries to consider the charges one at a time, beginning with the most serious and proceeding to lesser-included offenses only after the jury has unanimously voted to acquit the defendant of the more serious charges. The jury that heard Alex Blueford's case followed these instructions, voting to acquit Alex Blueford of charges of capital and first-degree murder before deadlocking on the lesser-included offense of manslaughter. As the forewoman of the jury explained in open court, the jury was "unanimous against" the charges of capital and first-degree murder, but could not unanimously resolve the manslaughter charge. *See* App. to Pet. for Cert. at 19a. Because of the deadlock, the jury did not consider the least serious of the four charges against Blueford, negligent homicide. *Id.* at 20a.

Despite the clear and uncontroverted fact that the jury had unanimously acquitted Alex Blueford of the two most serious charges against him, the Arkansas Supreme Court held that the Double Jeopardy Clause, applied to the states by the Fourteenth Amendment, did not forbid Arkansas from retrying him on those charges because the jury deadlocked on a lesser-included charge. Adopting what it described as the view of "the majority of jurisdictions," App. to Pet. for Cert. at 12a, the Arkansas Supreme Court held that the State was free to retry Blueford on all charges, including the two most serious charges unanimously rejected by the jury. The court rejected the "minority view"—that the Double Jeopardy Clause prohibits retrial of offenses of which the jury acquitted the defendant—as

unpersuasive and contrary to prior Arkansas Supreme Court precedent. App. to Pet. for Cert. at 13a.

Amicus urges this Court to grant *certiorari* to resolve this conflict and clarify the scope of the Double Jeopardy Clause's protection of jury acquittals. By holding that Arkansas could prosecute Blueford for capital and first-degree murder, notwithstanding the jury's unanimous rejection of both charges, the decision below threatens core constitutional values at the heart of the Fifth and Fourteenth Amendments. Giving prosecutors a second chance to convict Blueford of charges a jury has unanimously rejected sharply conflicts with the Constitution's text and history and numerous decisions of this Court. *See, e.g.*, *Green v. United States*, 355 U.S. 184, 190 (1957) (holding that jury's refusal to convict on first-degree murder charge was an "implicit acquittal" protecting the defendant from retrial since "[h]e was forced to run the gantlet once on that charge and the jury refused to convict him"). While the State, of course, is free to retry Blueford on the charges on which the jury deadlocked or did not decide, the Double Jeopardy Clause makes the jury's vote to acquit Blueford on capital and first-degree murder charges final.

A. The Text and History of the Fifth Amendment's Double Jeopardy Clause Prohibit Retrial After Jury Acquittal.

The Double Jeopardy Clause of the Fifth Amendment provides "nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb." U.S. CONST. amend. V. In incorporating into the Constitution this critical safeguard of liberty, the framers of the Fifth Amendment secured to all persons an individual right against "being subjected to the hazards of trial and possible conviction more than once for an alleged offense," *Green*, 355 U.S. at 187, and a structural protection of trial by jury. Where the jury votes to acquit, exercising its "overriding responsibility to stand between the accused and a potentially arbitrary or abusive Government," *United States v. Martin Linen Supply Co.*, 430 U.S. 564, 572 (1977), retrial is absolutely barred.

The Double Jeopardy Clause has its origins in English common law, and the Americans of the founding generation viewed the prohibition on double jeopardy as a fundamental right essential to the protection of liberty from government over-reaching. *See* 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES, § 1781, at 659 (1833) (calling the prohibition on double jeopardy "another great privilege secured by the common law"). The Double Jeopardy Clause was one of several amendments in the Bill of Rights that "fortify and guard th[e] inestimable right of trial by jury," *United States v. Gibert*, 25 F. Cas.

1287, 1294 (C.C.D. Mass. 1834) (Story, J.), a "part of that admirable common law, which had fenced round, and interposed barriers on every side against the approaches of arbitrary power." 3 STORY, COMMENTARIES ON THE CONSTITUTION, § 1773, at 652-53.

In his famous Commentaries on the Laws of England, William Blackstone described the two common law pleas, *autrefois acquit* and *autrefois convict*, that inspired the text of the Double Jeopardy Clause. "[T]he plea of *autrefois acquit*, or a former acquittal, is grounded on the universal maxim of the common law of England, that no man is to be brought into jeopardy of his life, more than once . . . . [W]hen a man is once fairly found not guilty . . . before any court of competent jurisdiction, he may plead such acquittal in bar of any subsequent accusation for the same crime." 4 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND *335. Blackstone explained that the second of these pleas, "*autrefois convict*, or a former conviction for the same identical crime, though no judgment was ever given," also "depends on the same principle as the former, that no man ought to be twice brought in danger of his life for one and the same crime." *Id.* at *336.

Blackstone's analysis highlighted the close connections between trial by jury, a right Blackstone called "the grand bulwark of [every Englishman's] liberties," *id.* at *349, and double jeopardy principles. As Blackstone observed, "[T]here hath yet been no instance of granting a new trial where the prisoner was *acquitted* up on

the first. If the jury, therefore, find the prisoner not guilty, then he is for ever quit and discharged of the accusation . . . ." *Id.* at *361. Double jeopardy principles, dating all the way back to Blackstone, thus "safeguard not simply the individual defendant's interest in avoiding vexation but also the integrity of the initial petit jury's judgment." AKHIL REED AMAR, THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION 96 (1998).

Drawing on Blackstone, the framers of the Bill of Rights wrote this critical guarantee against government overreaching explicitly into the Constitution, providing "a double security against the prejudices of judges, who may partake of the wishes and opinions of government, and against the passions of the multitude, who may demand their victim with a clamorous precipitancy." 3 STORY, COMMENTARIES ON THE CONSTITUTION, § 1774, at 653. Debates over the Bill of Rights explicitly affirmed the fundamental double jeopardy principle that a jury's acquittal is final, barring either a new trial or a successive prosecution.

During debates on an early version of the Double Jeopardy Clause proposed by James Madison,[3] the framers repeatedly affirmed the finality of a jury's acquittal, barring a second trial or prosecution. Rep. Roger Sherman observed that

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[3] Madison's initial proposal provided that "No person shall be subject, except in cases of impeachment, to more than one punishment or one trial for the same offence." Annals of Congress, 1st Cong., 1st Sess. 451-52 (1789).

"the courts of justice would never think of trying and punishing twice for the same offence. If the person was acquitted on the first trial, he ought not to be tried a second time." Annals of Congress, 1st Cong., 1st Sess. 782 (1789). Rep. Samuel Livermore noted that "[m]any persons may be brought to trial . . . but for want of evidence may be acquitted; in such cases, it is the universal practice in Great Britain, and in this country, that persons shall not be brought to a second trial for the same offence." *Id.* In this respect, the Double Jeopardy Clause provided an important structural protection of trial by jury, a right James Madison noted was "as essential to secure the liberty of the people as any one of the pre-existent rights of nature." *Id.* at 454.

Madison's initial proposal was amended in the Senate. In its final form, the Fifth Amendment's Double Jeopardy Clause used "the more traditional language employing the familiar concept of jeopardy, . . . language that tracked Blackstone's statement of the principles of *autrefois acquit* and *autrefois convict*." *United States v. Wilson*, 420 U.S. 332, 341-42 (1975).

The Double Jeopardy Clause included in the Bill of Rights did not originally apply to the actions of state governments, but eighty years later, "[t]he constitutional amendments adopted in the aftermath of the Civil War fundamentally altered our country's federal system." *McDonald v. City of Chicago*, 130 S. Ct. 3020, 3028 (2010). Introducing the Fourteenth Amendment in the Senate, Jacob Howard explained that its broad text protected against state action all of the "personal rights

guaranteed and secured by the first eight amendments of the Constitution," Cong. Globe, 39th Cong., 1st Sess. 2765 (1866), including the Fifth Amendment's prohibition on double jeopardy.

It is now firmly established under this Court's precedents that the Fifth Amendment's Double Jeopardy Clause "is a fundamental ideal in our constitutional heritage that . . . appl[ies] to the States through the Fourteenth Amendment," *Benton v. Maryland*, 395 U.S. 784, 794 (1969), and forbids the government—whether state or federal—from retrying a defendant following a jury's acquittal. "[I]ncorporated Bill of Rights protections 'are all to be enforced against the States under the Fourteenth Amendment according to the same standards that protect those personal rights against federal encroachment,'" *McDonald*, 130 S. Ct. at 3035 (quoting *Malloy v. Hogan*, 378 U.S. 1, 10 (1964)).

Consistent with the text and history of the Fifth Amendment, this Court has repeatedly held that retrial following an acquittal is strictly prohibited. In interpreting the Double Jeopardy Clause to give "absolute finality to a jury's verdict of acquittal," *Burks v. United States*, 437 U.S. 1, 16 (1978), this Court has drawn specifically on the Fifth Amendment's text and history, quoting at length from Blackstone and demonstrating that his Commentaries "greatly influenced the generation that adopted the Constitution," *Green*, 335 U.S. at 187 (discussing Blackstone), and informed the specific wording of the Fifth Amendment's Double Jeopardy Clause. *See Wilson*, 420 U.S. at 341-42.

It is thus no surprise that the Court has recognized that "[p]erhaps the most fundamental rule in the history of double jeopardy jurisprudence has been that '[a] verdict of acquittal . . . could not be reviewed, on error or otherwise, without putting [a defendant] twice in jeopardy, and thereby violating the Constitution." *Martin Linen*, 430 U.S. at 571 (quoting *United States v. Ball*, 163 U.S. 662, 671 (1896)); *see also Green*, 355 U.S. at 188 ("[A] verdict of acquittal is final, ending a defendant's jeopardy, and even when 'not followed by any judgment, is a bar to a subsequent prosecution for the same offence.'") (quoting *Ball*, 163 U.S. at 671). As Justice Scalia has observed, giving the government a second chance to prove an acquitted defendant guilty of the same crime "would violate the very core of the double jeopardy prohibition." *Monge v. California*, 524 U.S. 721, 741 (1998) (Scalia, J., dissenting).

B. The Authority of Courts to Declare a Mistrial Must Be Exercised Consistent With the Fifth Amendment's Protection of Jury Acquittals.

These fundamental principles do not lose their force here simply because the jury that heard Blueford's case was not able to resolve all of the charges against him. While, of course, the Fifth Amendment does not prevent the government from retrying Blueford on charges of which he "has not been convicted or acquitted," *United States v. Perez*, 22 U.S. (9 Wheat.) 579, 580 (1824), once the jury

acquitted Blueford of the two most serious charges, the court's duty under the Constitution was to enter a verdict of acquittal on those charges. A court's wide discretion to call a mistrial where "there is a manifest necessity for the act, or the ends of public justice would be defeated," *id.* at 580, ends where the jury has, in fact, acquitted the defendant of all or some of the charges against him or her. *See also Renico v. Lett*, 130 S. Ct. 1855, 1862-64 (2010).

The Fifth Amendment's prohibition on double jeopardy protects the jury's judgment that the defendant is not guilty of the charges and is entitled to an acquittal, not the ministerial act of reducing their vote to a judgment. The framers, who were concerned that "the prejudice of judges . . . may partake of the wishes and opinions of the government," 3 STORY, COMMENTARIES ON THE CONSTITUTION, § 1774, at 653, gave the jury final say over a defendant's guilt or innocence. Indeed, the Double Jeopardy Clause applies even when the jury enters no formal verdict or judgment of acquittal, convicting only on lesser charges. *See Green*, 335 U.S. at 190 (holding that jury's refusal to convict on first-degree murder charge was an "implicit acquittal" protecting the defendant from retrial since "[h]e was forced to run the gantlet once on that charge and the jury refused to convict him"). It is thus of no constitutional moment that the jury's acquittal was not reflected in any order or judgment.

Under the text and history of the Double Jeopardy Clause, the jury's acquittal of Blueford on

charges of capital and first-degree murder were final, forever barring a second trial on those charges. Blueford should not be deprived of Double Jeopardy protections simply because the jury could not agree on all of the charges against him. *Cf. Commonwealth v. Cook*, 6 Serg. & Rawle 577, 581-83 (Pa. 1822) (finding mistrial improper as to all defendants where jury acquitted two defendants of the charges, but deadlocked on third defendant).

CONCLUSION

For the foregoing reasons, *amicus* urges the Court to grant the Petition for Writ of Certiorari.

Respectfully submitted,

DOUGLAS T. KENDALL
ELIZABETH B. WYDRA*
*Counsel of Record
DAVID H. GANS
CONSTITUTIONAL
ACCOUNTABILITY CENTER
1200 18th Street NW
Suite 1002
Washington, D.C. 20036
(202) 296-6889
elizabeth@theusconstitution.org

Counsel for Amicus Curiae

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AMICUS CURIAE BRIEF

RECORDS AND BRIEFS

No. 10-1320

In the Supreme Court of the United States

ALEX BLUEFORD, PETITIONER

v.

STATE OF ARKANSAS

On Petition for a Writ of Certiorari to the Supreme Court of Arkansas

BRIEF FOR THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AS *AMICUS CURIAE* SUPPORTING PETITIONER

Jeffrey T. Green
Co-chair, Amicus *Committee*
NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS
1501 K Street, N. W.
Washington, D. C. 20005

Christopher M. Egleson
Counsel of Record
Jennelle D. Menendez
AKIN GUMP STRAUSS HAUER & FELD LLP
One Bryant Park
New York, N. Y. 10036
(212) 872-1039
cegleson@akingump.com

Counsel for Amicus Curiae

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

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TABLE OF CONTENTS

Interest of *amicus curiae* 1

Summary of argument 2

Reasons the writ should be granted 3

I. The question presented is important because the instructions here are widely used 3

II. The holding below warrants review because it is inconsistent with *Green* and *Price* 7

III. This petition is the right vehicle because the decision finally determines that petitioner must stand trial on a charge a jury unanimously rejected 11

TABLE OF AUTHORITIES

Federal Cases

Abney v. *United States*,
431 U. S. 651 (1977) 11

American Const. Co. v. *Jacksonville, Tampa & Key W. Ry. Co.*,
148 U. S. 372 (1893) 11

Bullington v. *Missouri*,
451 U. S. 430 (1981) 12

Catches v. *United States*,
582 F. 2d 453 (CA8 1978) 6

Diaz v. *Sec'y for Dep't of Corrs.*,
285 F. App'x 589 (CA11 2008) 7

Green v. *United States*,
355 U. S. 184 (1957) ..... passim

Harris v. *Washington*,
404 U. S. 55 (1971) 11

Harrison v. *Gillespie*,
--- F.3d ---, 2011 WL 1758657 (CA9 2011) 7

Pharr v. *Israel*,
629 F.2d 1278 (CA7 1980) 6

Price v. *Georgia*,
398 U. S. 323 (1970) ..... passim

Richardson v. *United States*,
468 U. S. 317 (1984) 12

Tomlin v. *McKune*,
300 F. App'x 592 (CA10 2008) 7

United States v. *Amey*,
No. 94-6325, 1995 WL 696680 (CA6 1995) 6

United States v. *Ball*,
163 U. S. 662 (1896) 8

United States v. *Carter*,
172 F. App'x 883 (CA10 2006) 6

Federal Cases—Continued

United States v. *Jackson*,
726 F. 2d 1466 (CA9 1984) 6

United States v. *Perez*,
9 Wheat. (22 U. S.) 579 (1824) 8

United States v. *Tsanas*,
572 F. 2d 340 (CA2 1978) 4

Wade v. *Hunter*,
336 U. S. 684 (1949) 8

Yeager v. *United States*,
129 S. Ct. 2360 (2009) 11, 12

State Cases

Ballinger v. *Wyoming*,
437 P. 2d 305 (Wyo. 1968) 6

Connecticut v. *Sawyer*,
630 A. 2d 1064 (Conn. 1993) 6

Connecticut v. *Tate*,
773 A. 2d 308 (Conn. 2001) 10

Dillon v. *Wisconsin*,
119 N. W. 352 (Wis. 1909) 4

Dresnek v. *Alaska*,
718 P. 2d 156 (Alaska 1986) 6

Idaho v. *Raudebaugh*,
864 P. 2d 596 (Idaho 1993) 6

Jones v. *Georgia*,
385 S. E. 2d 400 (Ga. 1989) 6

Lindsey v. *Alabama*,
456 So. 2d 383 (Ala. Crim. App. 1983) 6

Montana v. *Van Dyken*,
791 P. 2d 1350 (Mont. 1990) 6

State Cases—Continued

New Hampshire v. *Taylor*,
677 A. 2d 1093 (N. H. 1996) 6

New Mexico v. *Castrillo*,
566 P. 2d 1146 (N. M. 1977) 10

New Mexico v. *Fielder*,
118 P. 3d 752 (N. M. Ct. App. 2005) 10

New York v. *Boettcher*,
505 N. E. 2d 594 (N. Y. 1987) 6

North Dakota v. *Daulton*,
518 N. W. 2d 719 (N. D. 1994) 6

Stone v. *Superior Court*,
646 P. 2d 809 (Cal. 1982) 10

Tennessee v. *Davis*,
266 S. W. 3d 896 (Tenn. 2008) 6, 7

Walker v. *Mississippi*,
671 So. 2d 581 (Miss. 1995) 6

Whiteaker v. *Alaska*,
808 P. 2d 270 (Alaska Ct. App. 1991) 10

Wright v. *United States*,
588 A. 2d 260 (D. C. 1991) 6

Other Authorities

Mod. Crim. Jury Instr. 3rd Cir. (2010) 6

Pattern Crim. Jury Instr. 11th Cir. (2010) 6

In the Supreme Court of the United States

No. 10-1320

ALEX BLUEFORD, PETITIONER

v.

STATE OF ARKANSAS

On Petition for a Writ of Certiorari to the Supreme Court of Arkansas

BRIEF FOR THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AS *AMICUS CURIAE* SUPPORTING PETITIONER

INTEREST OF *AMICUS CURIAE*

Amicus curiae the National Association of Criminal Defense Lawyers (NACDL) is a non-profit association of lawyers who practice criminal law before virtually every state and federal bar in the country.[1] NACDL's more than 12,800 member attorneys and the 35,000 members of its state, local, and international affiliates represent defendants in a wide variety of criminal cases, including in cases that may involve the double-jeopardy issue raised in the petition.

[1] Counsel of record received timely notice under Rule 37.2(a) of NACDL's intent to file this brief, and all parties consented to its filing. No party's counsel authored any part of this brief, and no person other than NACDL and its counsel made any monetary contribution intended to fund its preparation or submission.

NACDL's members are interested in the resolution of this recurring question because it will affect the rights of their current and future clients.

SUMMARY OF ARGUMENT

This should have been a simple case. Petitioner said that the death of his girlfriend's son was an accident. The State tried to prove that it was intentional, but all twelve jurors disagreed, rejecting the charges of capital and first-degree murder. The jurors could not agree, however, on whether petitioner committed manslaughter, and the court declared a mistrial. As many other courts would have, the Arkansas courts should have applied the Double Jeopardy Clause to prevent a retrial on the murder charges, but they did not.

This Court's Double Jeopardy Clause cases—in particular, *Green* v. *United States*, 355 U. S. 184 (1957), and *Price* v. *Georgia*, 398 U. S. 323 (1970)—require the conclusion that because the jury voted unanimously against convicting petitioner on both of the intentional murder charges, petitioner cannot be retried on those charges. As the petition explains, a number of states would so hold under these circumstances, but the State of Arkansas and several others allow retrial on the same facts.

In this brief, NACDL argues the following. First, the problem addressed here is worthy of this Court's attention because the "acquittal first" instructions used below are commonplace, and are likely to remain in continued use in a large number of jurisdictions. That widespread and continuing use means that the question presented will arise again and again in the future, and so resolving it is important.

Second, this Court's review is warranted here not only because of the divided state court authority but further because the holding of the court below, and of the courts that share its view of the law, is inconsistent with the Court's decisions in *Green* and *Price*. The proper resolution of this issue should not have been a close call, so review is required to correct the approach of the court below and the courts that join its side of the divide on this issue.

Third, review is warranted in this procedural posture. The fact that this petition arises from a pretrial order is no impediment to granting the writ. The Double Jeopardy Clause protects an accused from standing trial twice on the same charges, so the Court has held that an order denying pretrial dismissal on former jeopardy grounds is a final order and is therefore ready for the Court's review.

REASONS THE WRIT SHOULD BE GRANTED

I. THE QUESTION PRESENTED IS IMPORTANT BECAUSE THE INSTRUCTIONS HERE ARE WIDELY USED

The question presented will recur because the situation the petitioner faced is common. The jury instructions used at the trial here are used in criminal trials in many jurisdictions, and in several states they are required to be used in every case involving lesser-included offenses.

The trial court here gave a "transition" instruction prescribing the method by which the jury was to proceed in evaluating petitioner's guilt on lesser-included offenses. The court required the jury to start its deliberations with the greatest offense—

here, capital murder—and come to a unanimous decision whether to convict. If it was unanimous for guilt the jury was to return a verdict; if it was unanimous for acquittal it was to move on to consider the next greatest included offense. And so on down the line of included offenses.

Because this method requires the jury to agree to acquit on a greater offense before it can consider a lesser offense, this method is known as "acquittal first." The instruction is also called a "hard" or "progressive" transition instruction. The ordinary alternative is a "reasonable efforts" instruction, under which the jury must try to reach agreement on a greater offense but may turn to a lesser offense if it cannot.

To provide context, there is considerable debate in the cases over how a jury should be instructed to proceed in considering lesser-included offenses. Instructions identical in substance to the acquittal-first instruction have long been in use. See, *e.g.*, *Dillon* v. *Wisconsin*, 119 N. W. 352, 357 (Wis. 1909). The first challenges to the propriety of those instructions that we are aware of came in the 1970s. Criminal defendants argued that mandating an agreement on a greater offense could coerce jurors into reaching a guilty verdict just to avoid a deadlock, and that the instructions improperly intruded on the province of the jury in structuring its own deliberations. They asked that the more permissive reasonable-efforts instruction be given instead.

Judge Friendly's opinion in *United States* v. *Tsanas*, 572 F. 2d 340 (CA2 1978), gave early consideration to these arguments. As Judge Friendly observed, the doctrine of lesser-included offenses presents the

problem that jurors may convict on a middle ground as a compromise among jurors who believe the defendant is guilty of a greater offense and jurors who believe he is not guilty. *Id.*, at 345. The acquittal-first transition instruction has the advantage, "from the Government's standpoint, of tending to avoid the danger that the jury will not adequately discharge its duties with respect to the greater offense, and instead will move too quickly to the lesser one." *Id.*, at 346. From the defendant's standpoint, the charge has the advantage that "it may prevent any conviction at all" because the jury may not reach unanimity on a charge and so may not be able to proceed to a lesser offense. *Ibid.*

By the same token, the charge has the disadvantage for the government that it may prevent a conviction on a lesser charge that "would otherwise have been forthcoming," and presents the danger to defendants that jurors who might otherwise have held out for conviction on a lesser charge might "throw in the sponge rather than cause a mistrial that would leave the defendant with no conviction at all." *Ibid.*

Examining these advantages and disadvantages to both sides from the instruction—and the mirror-image disadvantages and advantages presented by a "reasonable efforts" instruction—the Second Circuit held that neither was erroneous as a matter of law but that it would be left to criminal defendants to elect which instruction they preferred in each case. *Ibid.*

In light of the potential advantages the acquittal-first instruction offers to parties, many courts endorse its use in some or all cases. In the federal system, the Second Circuit's approach has been adopted

by the Eighth and Ninth Circuits.[2] Unpublished decisions in the Sixth and Tenth Circuits evidence that acquittal-first instructions are in use in those circuits as well, as do the current pattern jury instructions in the Third and Eleventh Circuits.[3] And the Seventh Circuit has held that such instructions are consistent with due process.[4] We are aware of no federal court of appeals that has forbidden their use. In short, acquittal-first instructions are available for use in federal criminal trials in most, if not all, federal circuits.

These instructions are also in wide use in the states. The high courts of at least a dozen states have expressly either required or approved the use of acquittal-first instructions.[5] They are also obviously

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[2] *Catches* v. *United States*, 582 F. 2d 453 (CA8 1978); *United States* v. *Jackson*, 726 F. 2d 1466 (CA9 1984) (per curiam).

[3] See *United States* v. *Carter*, 172 F. App'x 883 (CA10 2006); *United States* v. *Amey*, No. 94-6325, 1995 WL 696680, at *5 (CA6 1995) (unpublished); Mod. Crim. Jury Instr. 3rd Cir. § 3.11 (2010); Pattern Crim. Jury Instr. 11th Cir. SI §§ 10.1 & 10.2 (2010).

[4] *Pharr* v. *Israel*, 629 F. 2d 1278 (CA7 1980).

[5] See *Tennessee* v. *Davis*, 266 S. W. 3d 896, 908 (Tenn. 2008); *New Hampshire* v. *Taylor*, 677 A. 2d 1093, 1097 (N. H. 1996); *Walker* v. *Mississippi*, 671 So. 2d 581, 607–608 (Miss. 1995); *North Dakota* v. *Daulton*, 518 N. W. 2d 719, 720 (N. D. 1994); *Connecticut* v. *Sawyer*, 630 A. 2d 1064, 1073 (Conn. 1993); *Idaho* v. *Raudebaugh*, 864 P. 2d 596, 598–601 (Idaho 1993); *Wright* v. *United States*, 588 A. 2d 260, 262 (D. C. 1991); *Montana* v. *Van Dyken*, 791 P. 2d 1350, 1361 (Mont. 1990); *Jones* v. *Georgia*, 385 S. E. 2d 400, 402 (Ga. 1989); *Stone* v. *Superior Ct.*, 646 P. 2d 809, 820 (Cal. 1982); *New York* v. *Boettcher*, 505 N. E. 2d 594, 597 (N. Y. 1987); *Dresnek* v. *Alaska*, 718 P. 2d 156, 157 (Alaska 1986); *Lindsey* v. *Alabama*, 456 So. 2d 383, 387 (Ala. Crim. App. 1983); *Ballinger* v. *Wyoming*, 437 P. 2d 305, 310 (Wyo. 1968).

in use in Arkansas. Pet. App. 7a. While several states forbid such instructions (see *Davis*, 266 S. W. 3d, at 906 (collecting cases)), their expressly approved use in at least Alabama, Alaska, Arkansas, California, Connecticut, the District of Columbia, Idaho, Mississippi, Montana, New Hampshire, New York, North Dakota, and Tennessee, as well federal jurisdictions, means that the question presented here is going to come up again and again. It will arise in every case in these jurisdictions in which a jury receives these acquittal-first instructions and then deadlocks while considering a lesser-included offense.[6]

II. THE HOLDING BELOW WARRANTS REVIEW BECAUSE IT IS INCONSISTENT WITH *GREEN* AND *PRICE*

The decision below also warrants review because it and the similar decisions cited in the petition (at 7) have decided an important federal question in a way that conflicts with this Court's cases. There is no way to reconcile the decision of the Arkansas Supreme Court in this case with *Green* and *Price*. Instead, the court below should have recognized—as a number of the cases on the other side of the divide have recog-

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[6] Recent examples of this or related issues arising just in the federal courts of appeals include *Harrison* v. *Gillespie*, — F. 3d —, 2011 WL 1758657 (CA9 2011) *(en banc)* (court need not inquire about juror's votes on various punishments when jury deadlocks during penalty deliberations in capital case); *Tomlin* v. *McKune*, 300 F. App'x 592 (CA10 2008) (addressing the issue here); and *Diaz* v. *Secretary for Department of Corrections*, 285 F. App'x 589 (CA11 2008) (no implied acquittal based on lesser-offense deadlock when jury may have returned to deliberations).

nized—that the question presented is controlled by *Green* and *Price*.

In *Green*, as here, the jury was instructed to consider a greater murder charge as well as a lesser-included homicide charge. *Green*, 355 U. S., at 185–186. There, the jury convicted on a lesser count, and that conviction was held to be an implicit acquittal on the greater charge that prevented retrial after a successful appeal. *Id.*, at 186. Here, the jurors were unanimous against petitioner's guilt on the murder charges, but deadlocked on manslaughter.

Green's language and logic apply directly in the situation contemplated by the question presented. The Double Jeopardy Clause "protect[s] an individual from being subjected to the hazards of trial and possible conviction more than once for an alleged offense." *Id.*, at 187. A verdict of acquittal bars retrial "even when 'not followed by any judgment.'" *Id.*, at 188 (quoting *United States* v. *Ball*, 163 U. S. 662, 671 (1896)). And critically, "it is not even essential that a verdict of guilt or innocence be returned for a defendant to have once been placed in jeopardy so as to bar a second trial." *Ibid.* That is precisely what happened here; no formal judgment was entered and no verdict was returned, but the jury deliberated on the murder charges and all jurors agreed that petitioner was not guilty. The proviso of *Wade* v. *Hunter*, 336 U. S. 684, 688–689 (1949), which allows retrial after a mistrial based on a jury's "failure * * * to agree on a verdict," does not apply here, because the jury did "agree" on a verdict as to murder even though the court declined to receive it. The was no "manifest" need for a mistrial on the murder charges (*United States* v. *Perez*, 9 Wheat. (22 U. S.) 579, 580 (1824)),

since the record indicates that the jury was prepared to return a verdict on those counts.

As in *Green*, here "the jury was authorized to find" petitioner guilty of either murder or a lesser offense. *Id.*, at 189–190. Petitioner "was in direct peril of being convicted and punished for * * * murder at his first trial," and though he "was forced to run the gantlet once on [the murder] charge[s]," the "jury refused to convict him." *Id.*, at 190. In *Green*, "[w]hen given the choice between finding [the defendant] guilty of either first or second degree murder it chose the latter." *Ibid.* Here, when "given the choice," the jury chose not to convict on the greater charge and could not agree whether to convict on the lesser. In *Green*, the jury's choice not to convict on the greater charge meant that the defendant's jeopardy on the greater charge had ended, because "the jury was dismissed without returning any express verdict on [the greater] charge" even though "it was given a full opportunity to return a verdict and no extraordinary circumstances appeared which prevented it from doing so." *Id.*, at 191. The same is true here, and so the same result is required.

Price, which reaffirmed *Green*, also requires that same result. As *Price* explained, the Court "has consistently refused to rule that jeopardy for an offense continues after an acquittal." *Price*, 398 U. S., at 329. The Court there recognized no distinction between an "express" acquittal and one that was "implied by a conviction on a lesser included offense," as long as in the latter circumstance the jury had "a full opportunity to return a verdict on the greater charge." *Ibid.* Applying the same logic, the court below should have held that *Price*, like *Green*, barred a second murder

trial here because the jury had the same "full opportunity" to convict on the murder charges, but did not do so. While here the record establishes that the jury voted unanimously to acquit on the murder charges (Pet. App. 4a), that is not necessary to the conclusion that *Green* and *Price* barred retrial. Under the acquittal-first instruction the jury received, the jury's deadlock on manslaughter demonstrated an acquittal on both murder charges just as much as the guilty verdicts on lesser-included offenses in those two cases "implied" an acquittal on the greater offenses in those cases. The jury's implicit acquittal terminated jeopardy in *Green* and *Price*, and the court below should have recognized that it terminated jeopardy here for identical reasons.

This conclusion follows from the logic of the decisions themselves, but it is also worth noting that the decisions rejecting the approach of the court below are rooted in *Green* and *Price*. *Stone* v. *Superior Court*, 646 P. 2d 809, 819 (Cal. 1982), relied heavily on *Green* and *Price*. *Whiteaker* v. *Alaska*, 808 P. 2d 270 (Alaska Ct. App. 1991), relied on *Stone*. *New Mexico* v. *Fielder*, 118 P. 3d 752 (N. M. Ct. App. 2005), relied on *New Mexico* v. *Castrillo*, 566 P. 2d 1146 (N. M. 1977), which in turn relied on *Green*. And *Connecticut* v. *Tate*, 773 A. 2d 308, 323–325 (Conn. 2001), relied on *Stone*, *Whiteaker*, and *Castrillo*. By contrast, the court below did not address those two decisions. Its omission and resulting erroneous decision, which now binds every Arkansas court, requires this Court's review to correct it.

III. THIS PETITION IS THE RIGHT VEHICLE BECAUSE THE DECISION FINALLY DETERMINES THAT PETITIONER MUST STAND TRIAL ON A CHARGE A JURY UNANIMOUSLY REJECTED

This case is a proper vehicle for deciding the question presented for the reasons explained in the petition. This is true notwithstanding that the Arkansas Supreme Court described petitioner's appeal as "interlocutory." Pet. App. 2a. The order here is "final" within the meaning of this Court's cases, so the considerations counseling against the Court's review of some interlocutory orders do not apply. See *American Const. Co.* v. *Jacksonville, Tampa & Key W. Ry. Co.*, 148 U. S. 372, 384 (1893).

A decision rejecting a double jeopardy claim is a final decision that the government may put the accused on trial. The Double Jeopardy Clause protects a defendant not only from conviction after a second trial but from the trial itself. The Clause prevents the state from "mak[ing] repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty." *Yeager* v. *United States*, 129 S. Ct. 2360, 2365–2366 (2009) (quoting *Green*, 355 U. S., at 187).

This Court's "jurisdiction is properly invoked under 28 U. S. C. §1257" by a petition from a state high court decision denying a pretrial plea of former jeopardy. *Harris* v. *Washington*, 404 U. S. 55, 56 (1971) *(per curiam)*. And similarly, in *Abney* v. *United States*, 431 U. S. 651 (1977), this Court held that the

denial of a double jeopardy claim "constitute[s] a complete, formal, and, in the trial court, final rejection" of such a claim because "[t]here are simply no further steps that can be taken" in the trial court "to avoid the trial the defendant maintains is barred by the Fifth Amendment's guarantee." *Id.*, at 659. As *Abney* held, "the rights conferred on a criminal accused by the Double Jeopardy Clause would be significantly undermined if appellate review of double jeopardy claims were postponed until after conviction and sentence" because the Clause protects a defendant "against being twice put to trial for the same offense." *Id.*, at 660–661.

The reasons for deeming the type of order at issue here "final" for jurisdictional purposes similarly support deeming the order final for purposes of this Court's discretionary decision whether to grant certiorari. And indeed this Court has granted certiorari in a similar posture on several occasions precisely because "the right" protected by the Double Jeopardy Clause "would be significantly impaired if review were deferred until after the trial." *Richardson* v. *United States*, 468 U. S. 317, 320 (1984); see also, *e.g.*, *Yeager*, 129 S. Ct., at 2635; *Bullington* v. *Missouri*, 451 U. S. 430, 437 & n.8 (1981).

Furthermore, certiorari is no less appropriate in this case even though a favorable ruling from the Court will leave petitioner subject to retrial on the lesser counts. First, a retrial on the lesser charges is not inevitable. The State may choose not to proceed to trial on the lesser charges if the greater are barred, or may accept a plea to the negligent homicide charge or the manslaughter charge if it knows the murder charges cannot be prosecuted.

Second, petitioner's right is to avoid the "ordeal" and "embarrassment," and consequent "anxiety and insecurity" of a second trial on the murder charges that the State has once failed to prove. "The Double Jeopardy Clause * * * is cast in terms of the risk or hazard of trial and conviction," and "to be charged and to be subjected to a second trial for first-degree murder is an ordeal not to be viewed lightly." *Price*, 398 U. S., at 331. "There is a significant difference to an accused whether he is being tried for murder or manslaughter." *Id.*, at 331 n.10. And the Clause furthermore must protect petitioner from the possibility of being found guilty on those charges and then incurring the "expense" and additional "ordeal" of any appeal on double jeopardy grounds. For all of these reasons, this is an appeal from a final order and there is no obstacle to this Court's taking review.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Jeffrey T. Green
Co-chair, Amicus *Committee*
NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS
1501 K Street, N. W.
Washington, D. C. 20005

Christopher M. Egleson
Counsel of Record
Jennelle D. Menendez
AKIN GUMP STRAUSS HAUER & FELD LLP
One Bryant Park
New York, N. Y. 10036
(212) 872-1039

JUNE 2011

JOINT APPENDIX

RECORD
AND
BRIEFS

Supreme Court U.S.
FILED
NOV 2 5 2011
CLERK

No. 10-1320

In the Supreme Court of the United States

ALEX BLUEFORD,
Petitioner,

v.

STATE OF ARKANSAS,
Respondent.

On Writ of Certiorari to the Arkansas Supreme Court

JOINT APPENDIX

DUSTIN MCDANIEL
Arkansas Attorney General
DAVID R. RAUPP
Senior Assistant Attorney General
Counsel of Record
EILEEN W. HARRISON
Assistant Attorney General
OFFICE OF THE ATTORNEY GENERAL
323 Center Street,
Suite 200
Little Rock, AR 72201
(501) 682-8023
david.raupp@arkansasag.gov

Attorneys for Respondent

CLIFFORD M. SLOAN
Counsel of Record
GEOFFREY M. WYATT
DAVID W. FOSTER
MOSHE SPINOWITZ
SKADDEN, ARPS, SLATE, MEAGHER & FLOM LLP
1440 New York Ave., N.W.
Washington, DC 20005
(202) 371-7000
cliff.sloan@skadden.com

WILLIAM R. SIMPSON, JR.
SHARON KIEL
CLINT MILLER
SIXTH JUDICIAL DISTRICT (ARKANSAS) PUBLIC DEFENDERS OFFICE
201 S. Broadway, Ste. 210
Little Rock, AR 72201
(501) 340-6120

Attorneys for Petitioner

PETITION FOR CERTIORARI FILED APRIL 25, 2011
CERTIORARI GRANTED OCTOBER 11, 2011

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TABLE OF CONTENTS

Page

Docket Entries from the Circuit Court of Pulaski County, Arkansas 7th Division, No. CR 2008 002797 1

Docket Entries from the Arkansas Supreme Court, No. CR 10-554 38

Felony Information (filed July 15, 2008) 42

Amended Felony Information (filed Aug. 3, 2009) 45

Excerpts of Transcript of Jury Trial 48

The following opinions and orders have been omitted in printing this joint appendix because they appear on the Appendix to the Petition for a Writ of Certiorari at the following pages:

Order Denying Defendant Blueford's Double Jeopardy-Based Motion to Dismiss the Pending Charges of Capital Murder and First Degree Murder, Circuit Court of Pulaski County, Arkansas 7th Division, Feb. 26, 2010 ..... 15a

Opinion of the Arkansas Supreme Court, Jan. 20, 2011 ..... 1a

Order of the Arkansas Supreme Court Denying Rehearing, Feb. 24, 2011 ..... 17a

APPENDIX A

CHRONOLOGICAL LIST OF DOCKET ENTRIES

In the Circuit Court of Pulaski County, Arkansas 7th Division
Docket for Case No. CR 2008 002797

Date Filed	Docket Text	Name
01/01/1950	LEGACY DOCKET SHEET Entry: none.	BLUEFORD, ALEX
7/15/2008	ORDER BOND SET Entry: BOND SET AMOUNT: 250,000.00 DEFENDANT: BLUEFORD,ALEX MARTIN ACTIVE	
7/15/2008	ARREST WARRANT ISSUED Entry: BENCH WARRANT WARRANT ISSUED ON: 07/15/2008 FOR: BLUEFORD,ALEX MARTIN AFF.APPROVED TO LRDC	
7/15/2008	MOF DIRECT Entry: none.	
7/15/2008	CRIMINAL INFORMATION SHEET Entry: none.	

7/25/2008	COST/FEE/FINE ASSESSED Entry: SHERIFF WARRANT FEE	BLUEFORD, ALEX
725/2008	ARREST WARRANT ISSUED Entry: BENCH WARRANT WARRANT SERVED ON: 07/25/2008 FOR: BLUEFORD,ALEX MARTIN AFF.APPROVED TO LRDC ARRESTED 7/24/08	
8/4/2008	DOCKET TEXT Entry: PLEA & ARRAIGNMENT 08/07/2008 09:00 AM JUDGE:7TH - HON. BARRY SIMS LOC:220 PLEA & ARRAIGNMENT - IN CUSTODY FOR: BLUEFORD,ALEX MARTIN	
8/7/2008	EVENT SCHEDULED THIS DATE Entry: none.	

8/7/2008	COURT APPEARANCE Entry: COURT APPEARANCE:DEF APPR AFI PD HANDWERKER PLEA NG W/S/R JT 1/7-8/09 @ 8:30 OH 12/15/08 @ 1:30 MCO 12/1/08	BLUEFORD, ALEX
8/7/2008	ORDER APPOINT COUNSEL Entry: AFFIDAVIT OF INDIGENCY & ORDER APPOINTING COUNSEL	BLUEFORD, ALEX
8/7/2008	FILING - OTHER Entry: PUBLIC DEFENDER USER FEE	BLUEFORD, ALEX
8/7/2008	DOCKET TEXT Entry: JURY TRIAL 01/07/2009 08:30 AM JUDGE:7TH - HON. BARRY SIMS LOC:220 JURY TRIAL DAY 1 OF 2 FOR: BLUEFORD,ALEX MARTIN	
8/7/2008	DOCKET TEXT Entry: JURY TRIAL 01/08/2009 08:30 AM JUDGE:7TH - HON. BARRY SIMS LOC:220 JURY TRIAL DAY 2 OF 2 FOR: BLUEFORD,ALEX MARTIN	

8/13/2008	NOTICE - OTHER Entry: FORMAL NOTICE DEF	BLUEFORD, ALEX
8/13/2008	MOTION DISCOVERY Entry: MOTION FOR DISCOVERY DEFENDANT	BLUEFORD, ALEX
8/25/2008	MOTION DISCOVERY Entry: MOTION FOR DISCOVERY STATE	BLUEFORD, ALEX
8/25/2008	RESPONSE TO MOTION FILED Entry: RESOPNSE TO DISCOVERY MOTION-STATE	BLUEFORD, ALEX
11/3/2008	SUBPOENA SERVED Entry: SUBPOENA SERVED MAC HUTCHINSON	
11/3/2008	SUBPOENA SERVED Entry: SUBPOENA SERVED KEEPER OF THE RECORDS AR CHILDREN HOSP	BLUEFORD, ALEX
12/2/2008	SUBPOENA SERVED Entry: SUBPOENA SERVED (PROSECUTOR) JERMAINE SMITH 1/7/09	

12/3/2008	SUBPOENA SERVED Entry: SUBPOENA SERVED (PROSECUTOR) COURTNEY MARQUIS PHILLIPS 1/7/09
12/5/2008	SUBPOENA SERVED Entry: SUBPOENA SERVED (PROSECUTOR) LABARBARA BISHOP 1/7/09
12/9/2008	SUBPOENA SERVED Entry: SUBPOENA SERVED (PROSECUTOR) STACEY CLAY 1/7/09
12/10/2008	SUBPOENA SERVED Entry: SUBPOENA SERVED (PROSECUTOR) OFC ALVIN JACKSON 1/7/09
12/11/2008	SUBPOENA SERVED Entry: SUBPOENA SERVED (PROSECUTOR) DET DEWANA PHILLIPS 1/7/09
12/11/2008	SUBPOENA SERVED Entry: SUBPOENA SERVED (PROSECUTOR) DET TOMMY HUDSON 1/7/09

12/11/2008	SUBPOENA SERVED Entry: SUBPOENA SERVED (PROSECUTOR) DET STUART SULLIVAN 1/7/09	
12/11/2008	SUBPOENA SERVED Entry: SUBPOENA SERVED (PROSECUTOR) DET CHUCK RAY 1/7/09	
12/11/2008	MOTION SUPPRESS Entry: MOTION TO SUPPRESS STATEMENT DEF	BLUEFORD, ALEX
12/15/2008	EVENT SCHEDULED THIS DATE Entry: none.	
12/15/2008	COURT APPEARANCE Entry: COURT APPEARANCE:DEF APPR W/PD JT CONT TO 4/28,29/09 @ 8:30 OH 3/6/09 @ 9 BOND INCREASED TO $500,000	BLUEFORD, ALEX
12/15/2008	SPEED LETTER Entry: SPEED LETTER:$500,000 SURETY BOND	BLUEFORD, ALEX
12/15/2008	FILING - OTHER Entry: WITNESS FEES / DET DEWANA PHILLIPS	

12/15/2008	FILING - OTHER Entry: WITNESS FEES / DET CHUCK RAY
12/15/2008	FILING - OTHER Entry: WITNESS FEES STWART SULLIVAN
12/15/2008	FILING - OTHER Entry: WITNESS FEES TOMMY HUDSON
12/17/2008	DOCKET TEXT Entry: 12/17/2008 REMOVED FROM DOCKET
12/17/2008	DOCKET TEXT Entry: 12/17/2008 REMOVED FROM DOCKET
12/17/2008	DOCKET TEXT Entry: JURY TRIAL 04/28/2009 08:30 AM JUDGE:7TH - HON. BARRY SIMS LOC:220 JURY TRIAL (DAY 1 OF 2) FOR: BLUEFORD,ALEX MARTIN

12/17/2008	DOCKET TEXT Entry: JURY TRIAL 04/29/2009 08:30 AM JUDGE:7TH - HON. BARRY SIMS LOC:220 JURY TRIAL (DAY2 OF 2) FOR: BLUEFORD,ALEX MARTIN
12/22/2008	SUBPOENA SERVED Entry: SUBPOENA SERVED (PROSECUTOR) 1/7/09 MATTHEW MCFADDEN SR
12/22/2008	SUBPOENA SERVED Entry: SUBPOENA SERVED (PROSECUTOR) 1/7/09 KIMBERLY TOLBERT
12/22/2008	SUBPOENA SERVED Entry: SUBPOENA SERVED (PROSECUTOR) DET DEWANNA PHILLIPS 12/15/08
12/22/2008	SUBPOENA SERVED Entry: SUBPOENA SERVED (PROSECUTOR) DET TOMMY HUDSON 12/15/08

12/31/2008	SUBPOENA SERVED Entry: SUBPOENA SERVED (PROSECUTOR) SGT JAMES LESHER 1/7/09
1/7/2009	EVENT CANCELLED Entry: none.
1/8/2009	EVENT CANCELLED Entry: none.
1/14/2009	FILING - OTHER Entry: WITNESS FEES - DET.STWART SULLIVAN
1/14/2009	FILING - OTHER Entry: WITNESS FEES - DET.TOMMY HUDSON
2/13/2009	SUBPOENA SERVED Entry: SUBPOENA SERVED (PROSECUTOR) JERMAINE SMITH 4/28/09 THRU 4/29/09
2/13/2009	SUBPOENA SERVED Entry: SUBPOENA SERVED (PROSECUTOR) LABARBARA BISHOP 4/28/09 THRU 4/29/09

2/13/2009	SUBPOENA SERVED Entry: SUBPOENA SERVED (PROSECUTOR) STACEY CLAY 4/28/09 THRU 4/29/09
2/17/2009	SUBPOENA SERVED Entry: SUBPOENA SERVED (PROSECUTOR) DET CHUCK RAY JT 4/28 THRU 4/29/09
2/17/2009	SUBPOENA SERVED Entry: SUBPOENA SERVED (PROSECUTOR) DET STUART SULLIVAN JT 4/28 THRU 4/29/09
2/17/2009	SUBPOENA SERVED Entry: SUBPOENA SERVED (PROSECUTOR) DET DEWANA PHILLIPS JT 4/28 THRU 4/29/09
2/17/2009	SUBPOENA SERVED Entry: SUBPOENA SERVED (PROSECUTOR) DET TOMMY HUDSON JT 4/28 THRU 4/29/09

3/2/2009	SUBPOENA SERVED Entry: SUBPOENA SERVED (PROSECUTOR) SGT JAMES LESHER 4/28 THRU 4/29/2009	
3/6/2009	EVENT SCHEDULED THIS DATE Entry: none.	
3/6/2009	COURT APPEARANCE Entry: COURT APPEARANCE:DEF APPR IN CUST W/PD; OH 3/23/09 @ 9	BLUEFORD, ALEX
3/23/2009	EVENT SCHEDULED THIS DATE Entry: none.	
3/23/2009	DOCKET TEXT Entry: 3/23/2009 REMOVED FROM DOCKET	
3/23/2009	DOCKET TEXT Entry: 3/23/2009 REMOVED FROM DOCKET	
3/23/2009	JURY TRIAL 08/11/2009 08:30 AM JUDGE:7TH - HON. BARRY SIMS LOC:220 JURY TRIAL (DAY 1 OF 3) FOR: BLUEFORD,ALEX MARTIN	

3/23/2009	DOCKET TEXT Entry: JURY TRIAL 08/12/2009 08:30 AM JUDGE:7TH - HON. BARRY SIMS LOC:220 JURY TRIAL (DAY 2 OF 3) FOR: BLUEFORD,ALEX MARTIN	
3/23/2009	DOCKET TEXT Entry: JURY TRIAL 08/13/2009 08:30 AM JUDGE:7TH - HON. BARRY SIMS LOC:220 JURY TRIAL (DAY 3 OF 3) FOR: BLUEFORD,ALEX MARTIN	
3/23/2009	COURT APPEARANCE Entry: COURT APPEARANCE:DEF APPR IN CUST W/PD OH CONT STT; JT 8/11/09 TO 8/13/09 @ 8:30; OH 7/24/09 @ 9	BLUEFORD, ALEX
4/28/2009	EVENT CANCELLED Entry: none.	
4/29/2009	EVENT CANCELLED Entry: none.	

6/26/2009	SUBPOENA SERVED Entry: SUBPOENA SERVED (PROSECUTOR) LABARBARA BISHOP 08/11/09 THRU 8/13/09
6/26/2009	SUBPOENA SERVED Entry: SUBPOENA SERVED (PROSECUTOR) STACEY CLAY 8/11/09 THRU 8/13/09
6/26/2009	SUBPOENA SERVED Entry: SUBPOENA SERVED (PROSECUTOR) KIMBERLY TOLBERT 8/11/09 THRU 8/13/09
7/2/2009	SUBPOENA SERVED Entry: SUBPOENA SERVED (PROSECUTOR) DET TOMMY HUDSON 8/11/09 THRU 8/13/09
7/2/2009	SUBPOENA SERVED Entry: SUBPOENA SERVED (PROSECUTOR) DET DEWANA PHILLIPS 8/11/09 THRU 8/13/09

7/2/2009	SUBPOENA SERVED Entry: SUBPOENA SERVED (PROSECUTOR) DET CHUCK RAY 8/11/09 THRU 8/13/09
7/2/2009	SUBPOENA SERVED Entry: SUBPOENA SERVED (PROSECUTOR) DET STUART SULLIVAN 8/11/09 THRU 8/13/09
7/2/2009	SUBPOENA SERVED Entry: SUBPOENA SERVED (PROSECUTOR) OFC ALVIN JACKSON 8/11/09 THRU 8/13/09
7/2/2009	SUBPOENA SERVED Entry: SUBPOENA SERVED (PROSECUTOR) SGT JAMES LESHER 8/11/09 THRU 8/13/09
7/7/2009	SUBPOENA SERVED Entry: SUBPOENA SERVED (PROSECUTOR) DET TOMMY HUDSON 7/24/09

7/7/2009	SUBPOENA SERVED Entry: SUBPOENA SERVED (PROSECUTOR) DET STUART SULLIVAN 7/24/09
7/7/2009	SUBPOENA SERVED Entry: SUBPOENA SERVED (PROSECUTOR) DET DEWANA PHILLIPS 7/24/09
7/10/2009	MOTION SUPPRESS Entry: MOTION TO SUPPRESS STATEMENT-DEF
7/13/2009	SUBPOENA SERVED Entry: SUBPOENA SERVED (PROSECUTOR) CYNTHIA WEBBER-LCSW 8/11/09 THRU 8/13/09
7/13/2009	SUBPOENA SERVED Entry: SUBPOENA SERVED (PROSECUTOR) DET CHCK RAY 7/24/09

7/15/2009	SUBPOENA SERVED Entry: SUBPOENA SERVED (PROSECUTOR) TAMECCA WILLIAMS 8/11/09 THRU 8/13/09
7/20/2009	SUBPOENA SERVED Entry: SUBPOENA SERVED (PROSECUTOR) MATTHEW MCFADDEN SR 8/11/09 THUR 8/13/09
7/21/2009	SUBPOENA SERVED Entry: SUBPOENA SERVED (PROSECUTOR) CYNTHIA WEBBER 7/24/09
7/21/2009	SUBPOENA SERVED Entry: SUBPOENA SERVED (PROSECUTOR) JERMAINE SMITH 8/11/09 THRU 8/13/09
7/21/2009	MOTION IN LIMINE Entry: MOTION IN LIMINE TO EXCLUDE PRIOR BAD ACTS DEF
7/24/2009	EVENT SCHEDULED THIS DATE Entry: none.

7/24/2009	FILING - OTHER Entry: WITNESS FEES - ALVIN JACKSON
7/24/2009	FILING - OTHER Entry: WITNESS FEES - DET CHUCK RAY
7/24/2009	DOCKET TEXT Entry: OMNIBUS HEARING 08/05/2009 09:00 AM JUDGE:7TH - HON. BARRY SIMS LOC:220 OMNIBUS HEARING FOR: BLUEFORD,ALEX MARTIN
7/24/2009	SUBPOENA SERVED Entry: SUBPOENA SERVED (PROSECUTOR) DR. MICHELLE MOSS 8/11/09-8/13/09
7/24/2009	SUBPOENA SERVED Entry: SUBPOENA SERVED (PROSECUTOR) DR. RHONDA DICK M.D. 08/11/09 - 08/13/09
7/24/2009	FILING - OTHER Entry: WITNESS FEES FOR TOMMY HUDSON

7/24/2009	FILING - OTHER Entry: WITNESS FEES FOR DEWANA PHILLIPS	
7/24/2009	COURT APPEARANCE Entry: COURT APPEARANCE:DEF APPR W/ATTY KIEL HRG ON MOT TO SUPP BEGAN TESTIMONY TAKEN HRG TO CONCLUDE 8/5/09 @ 9	BLUEFORD, ALEX
7/28/2009	MOTION QUASH Entry: MOTION TO QUASH SUBPOENAS STANLEY D RAULS	
7/29/2009	MOTION QUASH Entry: SECOND MOTION TO QUASH SUBPOENA	
7/30/2009	SUBPOENA SERVED Entry: SUBPOENA SERVED (PROSECUTOR) OFC ALVIN JACKSON 7/24/09	
7/31/2009	MOTION OTHER Entry: MOTION TO EXCLUDE "EXPERT" TESTIMONY	

8/3/2009	AMENDED CRIMINAL INFORMATION Entry: AMENDED FELONY INFORMATION :AMD TO CHANGE OFFENSE DATE(S) AND TO ADD AN HABITUAL OFFENSE	
8/3/2009	ORDER OTHER Entry: ORDER GRANTING SECOND MOTION TO QUASH	
8/5/2009	EVENT SCHEDULED THIS DATE Entry: none.	
8/5/2009	COURT APPEARANCE Entry: COURT APPEARANCE:DEF APPR IN CUST W/PD MOT TO SUPPRESS DENIED ON ALL STATEMENTS; DEATH PENALTY WV; MOT TO EXCLUDE EXPERT TESTIMONY DENIED	BLUEFORD, ALEX
8/6/2009	ORDER OTHER Entry: ORDER GRANTING MOT TO QUASH	

8/7/2009	ORDER OTHER Entry: ORDER DENYING DEFENSE MOTION TO SUPPRESS AND TO EXCLUDE EXPERT TESTIMONY
8/11/2009	EVENT SCHEDULED THIS DATE Entry: none.
8/11/2009	FILING - OTHER Entry: WITNESS FEES - DET DEWANA PHILLIPS
8/11/2009	FILING - OTHER Entry: WITNESS FEES - DET TOMMY HUDSON
8/11/2009	FILING - OTHER Entry: WITNESS FEES - DET CHUCK RAY
8/11/2009	FILING - OTHER Entry: WITNESS FEES FOR LINDA MCFADDEN
8/11/2009	FILING - OTHER Entry: WITNESS FEES FOR OFFICER ALVIN JACKSON

8/11/2009	JURY TRIAL SCHEDULED Entry: JURY TRIAL JUDGMENT:DEF APPR W/ATTY S KIEL & J TOBLER FOR DEF; W JONES & E ABBOTT FOR STATE;TRIAL STARTED; RECESSED @ 6PM TO RTN ON THE 12TH FOR 2ND DAY	BLUEFORD, ALEX
8/12/2009	EVENT SCHEDULED THIS DATE Entry: none.	
8/12/2009	DOCKET TEXT Entry: JURY TRIAL 08/19/2009 09:00 AM JUDGE:7TH - HON. BARRY SIMS LOC:220 JURY TRIAL FOR: BLUEFORD,ALEX MARTIN	
8/12/2009	DOCKET TEXT Entry: JURY TRIAL 08/20/2009 09:00 AM JUDGE:7TH - HON. BARRY SIMS LOC:220 JURY TRIAL FOR: BLUEFORD,ALEX MARTIN	

8/12/2009	DOCKET TEXT Entry: 08/12/2009 REMOVED FROM DOCKET	
8/12/2009	FILING - OTHER Entry: WITNESS FEES FOR MATTHEW MCFADDEN	
8/12/2009	FILING - OTHER Entry: WITNESS FEES FOR DEWANA PHILLIPS	
8/12/2009	FILING - OTHER Entry: WITNESS FEES FOR TOMMY HUDSON	
8/12/2009	NOTICE APPEAR AND SHOW CAUSE Entry: NOTICE TO APPEAR JT 8/19/09 & 8/20/09 @ 9 ALEX BLUEFORD	BLUEFORD, ALEX
8/13/2009	EVENT CANCELLED Entry: none.	
8/18/2009	SUBPOENA SERVED Entry: SUBPOENA SERVED (PROSECUTOR) JERMAINE SMITH 08/19/09	
8/19/2009	EVENT SCHEDULED THIS DATE Entry: none.	

8/19/2009	JURY TRIAL SCHEDULED Entry: JURY TRIAL JUDGMENT:S KIEL & J TOBLER FOR DEF; W JONES & E ABBOTT FOR STATE; 2ND DAY OF TRL BEGAN; RECESSED @ 7PM TIL 8/20/09 FOR CONT OF TRL	BLUEFORD, ALEX
8/20/2009	EVENT SCHEDULED THIS DATE Entry: none.	
8/20/2009	SUBPOENA SERVED Entry: SUBPOENA SERVED (PROSECUTOR) DET DEWANA PHILLIPS 8/19/09	
8/20/2009	SUBPOENA SERVED Entry: SUBPOENA SERVED (PROSECUTOR) DET TOMMY HUDSON 8/19/09	
8/20/2009	SUBPOENA SERVED Entry: SUBPOENA SERVED (PROSECUTOR) DET STUART SULLIVAN 8/19/09	

8/20/2009	JURY TRIAL SCHEDULED Entry: JURY TRIAL JUDGMENT:S KEIL & J TOBLER FOR DEF; W JONES & E ABBOTT FOR STATE; 3RD DAY OF TRL; JURY OUT @ 4:30PM, @ 10PM AFTER 2-3 ATTEMPTS TO ASCERTAIN A VERDICT, THE JURY WAS UNABLTY TO REACH A VERDICT; THE COURT DECLARED A MISTRL	BLUEFORD, ALEX
8/20/2009	LEGACY DOCKET SHEET Entry: DOCKET SHEET	BLUEFORD, ALEX
8/20/2009	MOD JUDGMENT/ DECREE/ORDER Entry: none.	
8/21/2009	DOCKET TEXT Entry: JURY TRIAL 03/23/2010 08:30 AM JUDGE:7TH - HON. BARRY SIMS LOC:220 JURY TRIAL - DAY 1 OF 4 FOR: BLUEFORD,ALEX MARTIN	

8/21/2009	DOCKET TEXT Entry: JURY TRIAL 03/24/2010 08:30 AM JUDGE:7TH - HON. BARRY SIMS LOC:220 JURY TRIAL - DAY 2 OF 4 FOR: BLUEFORD,ALEX MARTIN
8/21/2009	DOCKET TEXT Entry: JURY TRIAL 03/25/2010 08:30 AM JUDGE:7TH - HON. BARRY SIMS LOC:220 JURY TRIAL - DAY 3 OF 4 FOR: BLUEFORD,ALEX MARTIN
8/21/2009	DOCKET TEXT Entry: JURY TRIAL 03/26/2010 08:30 AM JUDGE:7TH - HON. BARRY SIMS LOC:220 JURY TRIAL - DAY 4 OF 4 FOR: BLUEFORD,ALEX MARTIN
8/21/2009	FILING - OTHER Entry: WITNESS FEES - DET TOMMY HUDSON
8/21/2009	FILING - OTHER Entry: WITNESS FEES - DET DEWANA PHILLIPS

8/21/2009	RETURN SERVICE NON EST INVENT Entry: SUBPOENA NON EST COURTNEY MARQIUS PHILLIPS 08/11/09 THRU 08/13/09
8/25/2009	MOD JUDGMENT/ DECREE/ORDER Entry: none.
8/26/2009	SUBPOENA SERVED Entry: SUBPOENA SERVED (PROSECUTOR) DET. C.E. PARROT 8/19/09
9/10/2009	MOTION OTHER Entry: MOTION REQUESTING A BILL OF PARTICULARS DEF
9/18/2009	SUBPOENA SERVED Entry: SUBPOENA DUCES TECUM SERVED DR COURTNEY RANALLO 8/6/09
9/18/2009	SUBPOENA SERVED Entry: SUBPOENA DUCES TECUM SERVED DR KAREN FARST 7/29/09

9/18/2009	SUBPOENA SERVED Entry: SUBPOENA DUCES TECUM SERVED TOMAS (TOMMY) MURILLO MD 7/30/09
9/18/2009	SUBPOENA SERVED Entry: SUBPOENA SERVED KEEPER OF THE RECORDS UAMS 9/29/09
10/9/2009	FILING - OTHER Entry: REQUEST FOR HRG DEF
11/3/2009	RESPONSE Entry: STATE'S RESPONSE TO DEF'S REQ FOR BILL OF PARTICULARS
12/21/2009	SUBPOENA SERVED Entry: SUBPOENA SERVED (PROSECUTOR) CYNTHIA WEBBER 03/23/10 THRU 03/26/10
12/21/2009	SUBPOENA SERVED Entry: SUBPOENA SERVED (PROSECUTOR) MD DR CHARLES KOKES 03/23/10 THRU 03/26/10

12/21/2009	SUBPOENA SERVED Entry: SUBPOENA SERVED (PROSECUTOR) DR. RHONDA DICK M.D. 03/23/10 THRU 03/26/10
12/22/2009	SUBPOENA SERVED Entry: SUBPOENA SERVED (PROSECUTOR) STACEY CLAY 03/23/10 THRU 03/26/10
12/23/2009	SUBPOENA SERVED Entry: SUBPOENA SERVED (PROSECUTOR) OFC ALVIN JACKSON JT 3/23 THRU 3/26/10
12/23/2009	SUBPOENA SERVED Entry: KIMBERLY TOLBERT JT 3/23 THRU 3/26/10
1/6/2010	SUBPOENA SERVED Entry: SUBPOENA SERVED (PROSECUTOR) STUART SULLIVAN 03/23/2010 THRU 03/26/2010

1/6/2010	SUBPOENA SERVED Entry: SUBPOENA SERVED (PROSECUTOR) JAMES LESHER 03/23/2010 THRU 03/26/2010
1/6/2010	SUBPOENA SERVED Entry: SUBPOENA SERVED (PROSECUTOR) TOMMY HUDSON 03/23/2010 THRU 03/26/2010
1/6/2010	SUBPOENA SERVED Entry: SUBPOENA SERVED (PROSECUTOR) DEWANA PHILLIPS 03/23/2010 THRU 03/26/2010
1/6/2010	SUBPOENA SERVED Entry: SUBPOENA SERVED (PROSECUTOR) CHUCK RAY 03/23/2010 THRU 03/26/2010
1/15/2010	BRIEF IN SUPPORT Entry: BRIEF/SUPPORT MOTION REQUESTING A SUPPLEMENTAL BILL OF PARTICULARS DEF

1/15/2010	MOTION OTHER Entry: MOTION REQ A SUPPLEMENTAL BILL OF PARTICULARS DEF
1/15/2010	NOTICE - OTHER Entry: NOTICE/BILL OF EXCEPTIONS DEF
1/21/2010	RESPONSE Entry: RESPONSE TO MOTION REQUESTING A SUPPLEMENTAL BILL OF PARTICULARS STATE
1/26/2010	RESPONSE Entry: REPLY TO RESPONSE TO MOT REQ A SUPPLEMENTAL BILL OF PARTICULARS DEF
2/12/2010	LETTER Entry: TO LAW CLERK, AND ORIGINAL FROM LAW CLERK TO SPECIAL JUDGE HANSHAW (WILL JONES)
2/12/2010	LETTER Entry: LETTER FROM JUDGE HANSHAW TO 7TH DIV CRT (EMILY ABBOTT)

2/23/2010	MOTION CONTINUANCE Entry: MOTION REQUESTING A CONTINUANCE DEF	BLUEFORD, ALEX
2/26/2010	ORDER MOTION DENIED Entry: ORDER DENYING DEF BLUEFORD'S DOUBLE JEOPARDY-BASED MOTION TO DISMISS THE PENDING CHARGES OF CAPITAL MURDER & FIRST DEGREE MURDER - (SPECIAL JUDGE HANSHAW)	BLUEFORD, ALEX
3/3/2010	NOTICE OF APPEAL Entry: NOTICE OF INTERLOCUTORY APPEAL DEF	BLUEFORD, ALEX
3/4/2010	ORDER OTHER Entry: ORDER GRANTING DEF BLUEFORD'S MOTION FOR CONTINUANCE	BLUEFORD, ALEX
3/24/2010	TRANSCRIPT Entry: TRANSCRIPT PICKED UP BY ALEX BURGES	
4/27/2010	REPORT/STATUS SCHEDULED Entry: none.	

5/14/2010	JUDGE NOTE Entry: DEF APPR RPT DATE SET FOR 9/24/10 @ 9AM; HRG TODAY SET AT DEF'S REQ; DEF WANTS A RULING ON WHEN SPDY TRL STARTED	BLUEFORD, ALEX
5/14/2010	REPORT/STATUS HELD Entry: none.	
7/8/2010	JURY TRIAL CANCELLED Entry: none.	
7/8/2010	JURY TRIAL CANCELLED Entry: none.	
7/8/2010	JURY TRIAL CANCELLED Entry: none.	
7/8/2010	JURY TRIAL CANCELLED Entry: none.	
7/8/2010	REPORT/STATUS HELD Entry: none.	
8/3/2010	SUBPOENA RETURN BY PROSECUTOR Entry: JERMAINE SMITH 3-23 THRU 3-26-10	BLUEFORD, ALEX

8/3/2010	SUBPOENA RETURN BY PROSECUTOR Entry: MATTHEW MCFADDEN 3-23 THRU 3-26-10	BLUEFORD, ALEX
8/3/2010	SUBPOENA RETURN BY PROSECUTOR Entry: LABARABARA BISHOP 3-23 THRU 3-26-10	BLUEFORD, ALEX
8/3/2010	SUBPOENA RETURN BY PROSECUTOR Entry: COURTNEY MARQUIS PHILLIPS 3-23 THRU 3-26-10	BLUEFORD, ALEX
8/3/2010	SUBPOENA RETURN BY PROSECUTOR Entry: TAMECCA WILLIAMS 3-23 THRU 3-26-10	BLUEFORD, ALEX
9/24/2010	JUDGE NOTE Entry: D APPR RPT DATE & TRIALS SET RPT 6/7/11; JT 6/23/11	BLUEFORD, ALEX
9/24/2010	SPEED LETTER Entry: NEXT COURT DATE 11/5/10 9 AM (REPORT)	BLUEFORD, ALEX
9/24/2010	NOTICE APPEAR AND SHOW CAUSE Entry: RPT ON APPEAL 11/5/10 @ 9	BLUEFORD, ALEX

9/29/2010	REPORT/STATUS HELD Entry: none.	
2/2/2011	COURT APPEARANCE Entry: (SPECIAL JUDGE HANSHAW) DEF APPR IN CUST; HRG TO SET TRL, COURT INFORMED BY DEF COUNSEL THAT MOT FOR REHEARING IS SET & POSSIBLE APPEAL TO FED COURT; SET FOR JT 6/20/11 THRU 6/23/11, SET 6/7/11 FOR PRELIMINARY 9AM	BLUEFORD, ALEX
2/2/2011	SPEED LETTER Entry: CT DATE SET	BLUEFORD, ALEX
2/2/2011	JURY TRIAL CANCELLED Entry: none.	
2/2/2011	JURY TRIAL CANCELLED Entry: none.	
2/2/2011	JURY TRIAL CANCELLED Entry: none.	
2/2/2011	NOTICE APPEAR AND SHOW CAUSE Entry: JT 6/20/11 THRU 6/23/11 @ 8:30 RPT 6/7/11 @ 9	BLUEFORD, ALEX

2/2/2011	REPORT/STATUS HELD Entry: none.	
2/28/2011	LETTER Entry: FROM SUPREME COURT	BLUEFORD, ALEX
5/13/2011	SUBPOENA RETURN BY PROSECUTOR Entry: CYNTHIA WEBBER-LCSW 6/20-23/11 @ 830	BLUEFORD, ALEX
5/13/2011	SUBPOENA RETURN BY PROSECUTOR Entry: DR MICHELLE MOSS 6/20-23/11 @ 830	BLUEFORD, ALEX
5/13/2011	SUBPOENA RETURN BY PROSECUTOR Entry: DR RHONDA DICK 6/20-23/11 @ 830	BLUEFORD, ALEX
5/13/2011	SUBPOENA RETURN BY PROSECUTOR Entry: KIMBERLY TOLBERT 6/20-23/11 @ 830	BLUEFORD, ALEX
5/13/2011	SUBPOENA RETURN BY PROSECUTOR Entry: STACEY CLAY 6/20-23/11 @ 830	BLUEFORD, ALEX
5/13/2011	SUBPOENA RETURN BY PROSECUTOR Entry: MATTHEW MCFADDEN SR 6/20-23/11@ 830	BLUEFORD, ALEX

5/18/2011	SUBPOENA RETURN BY PROSECUTOR Entry: SGT JAMES LESHER 6/20-23/11 @ 830	BLUEFORD, ALEX
5/18/2011	SUBPOENA RETURN BY PROSECUTOR Entry: OFC ALVIN JACKSON 6/20-23/11 @ 830	BLUEFORD, ALEX
5/26/2011	JURY TRIAL CANCELLED Entry: none.	
5/26/2011	JURY TRIAL CANCELLED Entry: none.	
5/26/2011	JURY TRIAL CANCELLED Entry: none.	
6/2/2011	SUBPOENA RETURN BY PROSECUTOR Entry: DET TOMMY HUDSON 6-20 THRU 6-23-11	BLUEFORD, ALEX
6/2/2011	SUBPOENA RETURN BY PROSECUTOR Entry: DET STUART SULLIVAN 6-20 THRU 6-23-11	BLUEFORD, ALEX

6/2/2011	SUBPOENA RETURN BY PROSECUTOR Entry: DET DEWANA PHILLIPS 6-20 THRU 6-23-11	BLUEFORD, ALEX
6/6/2011	REPORT/STATUS HELD Entry: none.	
6/7/2011	JUDGE NOTE Entry: SPECIAL JUDGE HANSHAW D APPR RPT HELD; POSTPONE JT DATE OF 6/23/11 RE-SET; RPT DATE OF 5/22/2012 9 AM	BLUEFORD, ALEX
6/7/2011	REPORT/STATUS HELD Entry: none.	
6/7/2011	JURY TRIAL CANCELLED Entry: none.	
6/7/2011	NOTICE APPEAR AND SHOW CAUSE Entry: none.	BLUEFORD, ALEX
6/8/2011	NOTICE HEARING SCHEDULED Entry: none.	KIEL, SHARON
6/17/2011	SUBPOENA RETURN BY PROSECUTOR Entry: DET CHUCK RAY 6/20-6-23-11 @ 830	BLUEFORD, ALEX

APPENDIX B

CHRONOLOGICAL LIST OF DOCKET ENTRIES

In the Arkansas Supreme Court
Docket for Case No. CR 10-554

Date Filed	Docket Text
5/28/2010	Briefing Commenced - Alex Blueford This event was tickled for 07/07/10 Appellant's Attorney - William Robert Simpson, Jr.
5/28/2010	Record Lodged Number of Volumes 3 Number of Sets 0
7/2/2010	FINAL Brief Extension - Alex Blueford This event was tickled for 08/21/10 Action = FINALEXT on 07/13/10 Appellant's Attorney - William Robert Simpson, Jr. Motion for extension of time. The time allowed for filing the Appellant's brief in the above case has been extended to August 21, 2010; final extension.
8/20/2010	Typed Brief Filed Timely - Alex Blueford Appellant's Attorney - William Robert Simpson, Jr.

8/20/2010	Briefing Commenced - State Of Arkansas This event was tickled for 09/24/10
8/20/2010	Record Checkout by Atty. of Record - State Of A a Appellee's Attorney - Attorney General Number of Volumes 3 Number of Sets 0
8/25/2010	Printed Brief Filed - Alex Blueford Appellant's Attorney - William Robert Simpson, Jr.
9/24/2010	Brief Filed Timely - State Of Arkansas Appellee's Attorney - Attorney General
9/28/2010	7 Day Reply Brief Extension - Alex Blueford This event was tickled for 10/18/10 Action = GRANTED on 09/28/10 Appellant's Attorney - William Robert Simpson, Jr.
10/15/2010	Brief Extension - Alex Blueford This event was tickled for 11/01/10 Action = GRANTED on 10/20/10 Appellant's Attorney - Clint Eugene Miller
11/1/2010	Typed Reply Brief Filed Alex Blueford Appellant's Attorney - Clint Eugene Miller
11/3/2010	Printed Reply Brief Filed Alex Blueford Appellant's Attorney - Clint Eugene Miller
1/13/2011	Supreme Court Votesheet Issued

1/13/2011	Case Submitted
1/20/2011	Opinion Panel Donald Corbin -- WRITING
1/20/2011	Majority Opinion Rendered ACTION = Affirmed Opinion Date - 01/20/11 Consist of 0 pages, Cite Number - Publish - yes Donald Corbin -- WRITING Affirmed Affirmed
2/7/2011	Petition for Rehearing - Alex Blueford Submitted to the court on - 02/17/11 Action = DENIED on 02/24/11 Appellant's Attorney - Clint Eugene Miller Appellant's petition for rehearing is denied.
2/7/2011	Motion for Stay of Mandate - Alex Blueford Submitted to the court on - 02/17/11 Action = GRANTED on 02/24/11 Appellant's Attorney - Clint Eugene Miller Appellant's petition requesting a stay of the issuance of the mandate is granted.
2/14/2011	Response to Petition for Rehearing - State Of Appellee's Attorney - Attorney General Eileen W. Harrison

2/24/2011	Letter Orders - Supreme Court Submitted to the court on - 02/17/11 Appellant's Attorney - Clint Eugene Miller
2/24/2011	MANDATE STAYED
5/2/2011	Notice of Filing Petition in U. S. Supreme Co Writ of certiorari filed 4/25/11 placed on the 4/27/11 docket as No. 10-1320
10/14/2011	U.S. Supreme Court Granted Petition for Writ The petition for writ of certiorari is granted.

APPENDIX C

FELONY INFORMATION

[000003]

IN THE CIRCUIT COURT OF PULASKI COUNTY, ARKANSAS 7TH DIVISION

STATE OF ARKANSAS PLAINTIFF

vs. NO. CR 2008-2797

ALEX MARTIN BLUEFORD DEFENDANT

FILED 07/15/2008
14:07:57
Pat O'Brien
Pulaski Circuit Clerk
D16

FELONY INFORMATION
COUNT 1

Larry Jegley, Prosecuting Attorney of the Sixth Judicial District of Arkansas, in the name, by the authority, and on behalf of the State of Arkansas, charges ALEX MARTIN BLUEFORD with the crime of violating Ark. Code Ann. 5-10-101 CAPITAL MURDER committed as follows, to wit: The said defendant(s), in Pulaski County, on or about January 28, 2008, unlawfully, feloniously, under circumstances manifesting extreme indifference to the value of human life, did knowingly cause the death of MATTHEW MCFADDEN JR, a person fourteen (14) years of age or younger at the time the murder was

committed, and said defendant was eighteen (18) years of age or older at the time the murder was committed, against the peace and dignity of the State of Arkansas.

LARRY JEGLEY
PROSECUTING ATTORNEY

By: /s/Terry R. Ball
Deputy Prosecuting Attorney

[000004]

PROSECUTOR NUMBER: 2008PC000253

INFORMATION OF DEFENDANTS

ALEX MARTIN BLUEFORD * * *

* * *
LITTLE ROCK, AR * * *
* * *
LITTLE ROCK, AR * * *
* * *
SHERWOOD, AR * * *

CUSTODY STATUS	: PULASKI COUNTY JAIL
BOND AMOUNT	: $250,000.00
BOND TYPE	:
SID#	: 3092554
ARREST DATE	: 6/13/2008
ARREST TRACKING #	: 02633823
RACE	: BLACK
GENDER	: M

WITNESSES

DET DEWANA PHILLIPS
DET TOMMY HUDSON
DET STUART SULLIVAN
SGT JAMES LESHER
OFC ALVIN JACKSON
JERMAINE SMITH
MATTHEW MCFADDEN SR
KIMBERLY TOLBERT
LABARBARA BISHOP
STACEY CLAY

APPENDIX D

AMENDED FELONY INFORMATION

[000048]

AMENDED

IN THE CIRCUIT COURT OF PULASKI COUNTY, ARKANSAS SEVENTH DIVISION

STATE OF ARKANSAS PLAINTIFF

vs. NO. CR 2008-2797

ALEX MARTIN BLUEFORD DEFENDANT

FILED 08/03/2009
10:15:23
Pat O'Brien
Pulaski County Clerk
D11

AMENDED TO CHANGE OFFENSE DATE(S) AND TO ADD AN HABITUAL OFFENSE

FELONY INFORMATION
COUNT 1

Larry Jegley, Prosecuting Attorney of the Sixth Judicial District of Arkansas, in the name, by the authority, and on behalf of the State of Arkansas, charges ALEX MARTIN BLUEFORD with the crime of violating Ark. Code Ann. 5-10-101 CAPITAL MURDER committed as follows, to wit: The said defendant(s), in Pulaski County, on or about November

28, 2007 through November 30, 2007, unlawfully, feloniously, under circumstances manifesting extreme indifference to the value of human life, did knowingly cause the death of MATTHEW MCFADDEN JR, a person fourteen (14) years of age or younger at the time the murder was committed, and said defendant was eighteen (18) years of age or older at the time the murder was committed, against the peace and dignity of the State of Arkansas.

Defendant, ALEX MARTIN BLUEFORD, has been previously convicted of more than one (1) but less than four (4) felonies, and consequently his sentence should be increased as provided for in Ark. Code Ann. 5-4-501(a), against the peace and dignity of the State of Arkansas.

LARRY JEGLEY
PROSECUTING ATTORNEY

By: /s/Will Jones
Deputy Prosecuting Attorney

[000049]

PROSECUTOR NUMBER: 2008PC000253

INFORMATION OF DEFENDANTS

ALEX MARTIN BLUEFORD * * *

* * *
LITTLE ROCK, AR * * *
* * *

LITTLE ROCK, AR * * *
* * *
SHERWOOD, AR * * *

CUSTODY STATUS	: PULASKI COUNTY JAIL
BOND AMOUNT	: $250,000.00
BOND TYPE	:
SID#	: 3092554
ARREST DATE	: 6/13/2008
ARREST TRACKING #	: 02633823
RACE	: BLACK
GENDER	: M

WITNESSES

DET DEWANA PHILLIPS
DET TOMMY HUDSON
DET STUART SULLIVAN
SGT JAMES LESHER
OFC ALVIN JACKSON
JERMAINE SMITH
MATTHEW MCFADDEN SR
KIMBERLY TOLBERT
LABARBARA BISHOP
STACEY CLAY

APPENDIX E

EXCERPTS OF TRANSCRIPT OF JURY TRIAL (CASE CAPTION OMITTED)

[000795]

* * * *

MR. JONES: Your Honor, both myself and Defense counsel have gone through a set and we have an agreed upon set of instructions. If we could present them to the Court at this time. I think they will vary a little bit from the ones originally presented to the court.

THE COURT: All right. Okay.

MR. JONES: And there's one, there an agreement on all of these instructions except one that Defense counsel has turned sideways so you can take that up when we get to that.

And you see, Judge, there are some that have some markings on there and the law clerk has graciously agreed to correct those for us after we get an approved set.

[000799]

* * * *

THE COURT: Okay. We took out murder in the first degree?

MR. JONES: Sir, I'm sorry?

THE COURT: We took out murder in the second degree?

MR. JONES: Yes, sir.

THE COURT: Okay, that is right.

MR. JONES: Yes, sir.

THE COURT: Counsel?

MR. JONES: Yes, sir.

THE COURT: Where did this 8301 VF come from?

MR. JONES: Which one?

THE COURT: Verdict form, We, the Jury, find Alex Blueford not guilty of a homicide offense ? Oh, this is the not guilty.

MR. JONES: That is, Your Honor. It's my [000800] understanding that we would go guilty, capital; guilty, murder first; guilty of manslaughter and then not guilty of a homicide offense.

THE COURT: All right. Okay.

MR. JONES: Yes, sir.

MRS. KIEL: Is there negligent homicide?

THE COURT: I misread it. It's here. I misread it.

MRS. KIEL: Oh, okay.

THE COURT: It's here. I misread it. And this is acceptable to- -

MRS. KIEL: Your Honor, can I just peek through there?

THE COURT: Pardon?

MRS. KIEL: Can I just look again, sir? May I just look again. I think I missed something. Can I look at the whole thing really fast?

THE COURT: Oh, oh, sure, sure.

MRS. KIEL: Thank you, sir.

(Pause in proceedings.)

* * * *

[000802]

* * * *

THE COURT: All right, ladies and gentlemen of the jury.

* * * *

[000807]

* * * *

REQUESTED INSTRUCTION NO. 12, AMCI 2d 301

Alex Blueford is charged with capital murder. This charge includes the lesser offense of murder in the first degree, manslaughter and negligent homicide. You may find the defendant guilty of one of these offenses or you may acquit him outright.

If you have a reasonable doubt of the guilt of the defendant on the greater offense, you may find him guilty only of the lesser offense. If you have a reasonable doubt as to the defendant's guilt of all [000808] offenses, you must find him not guilty.

REQUESTED INSTRUCTION NO. 13, AMCI 2d 302

If you have a reasonable doubt of the defendant's guilt on the charge of capital murder, you will consider the charge of murder in the first degree.

REQUESTED INSTRUCTION NO. 14, AMCI 2d 1002

To sustain this charge, the State must prove beyond a reasonable doubt:

That Alex Blueford knowingly caused the death of Matthew McFadden, Jr., a person he knew to be 14 years of age or younger.

DEFINITION

"Knowingly." A person acts knowingly with respect to his conduct or the circumstances that exist at

the time of his act when he is aware that his conduct is of that nature or that such circumstances exist. A person acts knowingly with respect to a result of his conduct when he is aware that it is practically certain that his conduct will cause such a result.

REQUESTED INSTRUCTION NO. 15,
AMCI 2D 302

If you have a reasonable doubt of the defendant's guilt on the charge of murder in the first degree, you will then consider the charge of manslaughter.

REQUESTED INSTRUCTION NO. 16,
AMCI 2d 1004

[000809]

To sustain this charge, the State must prove beyond a reasonable doubt that:

Alex Blueford recklessly caused the death of Matthew McFadden, Jr.

DEFINITION

"Recklessly." A person acts recklessly with respect to the results of his conduct when he consciously disregards a substantial and unjustifiable risk that the results will occur. The risk must be of a nature and degree that disregard thereof constitutes a gross deviation from the standard of care that a reasonable person would observe in the same situation.

REQUESTED INSTRUCTION NO. 17,
AMCI 2d 302

If you have a reasonable doubt of the defendant's guilt on the charge of manslaughter, you will then consider the charge of negligent homicide.

REQUESTED INSTRUCTION NO. 18,
AMCI 2d 1005

To sustain this charge, the State must prove beyond a reasonable doubt that:

Alex Blueford negligently caused the death of Matthew McFadden, Jr.

DEFINITION

The term "negligent" as used in this criminal case means more that it does in civil cases. To prove negligence in a criminal case the State must show [000810] beyond a reasonable doubt that Alex Blueford should have been aware of a substantial and unjustifiable risk that death would occur. The risk must have been such a nature and degree that his failure to perceive it, considering the nature and purpose of his conduct and the circumstances known to him, involved a gross deviation from the standard of care that a reasonable person would have observed in his situation.

REQUESTED INSTRUCTION NO. 19, AMCI 2d 8101

If you find Alex Blueford guilty, you will so indicate on a verdict form to be given you. If you find Alex Blueford not guilty, you will so indicate on the appropriate verdict form.

* * * *

[000810]

* * * *

THE COURT: The State may close.

MS. ABBOTT: Thank you, Your Honor.

* * * *

[000813]

* * * *

But what he didn't factor into that was that there were going to be doctors who were looking for signs of injury. Doctors that when they found those signs of injury and they compared it to the story that this man gave, the history that they had, it didn't match. It does not match that he reflexively threw his elbow back and knocked Matthew into a table. And the reason it doesn't match is because there are no bruises on the outside of Matthew's body. There are no impact sites that you would expect if someone had been knocked into a piece of furniture. Ladies and gentlemen, it's common sense that when a person runs, even runs into a piece of furniture, it's not unusual to get a bruise. But this little boy didn't have any.

The Judge has read you the jury instructions. And one of the most important of those, obviously, is capital murder. You will get a set of these to take back with you so you will get to go back over them. There are a couple of things in this jury instruction that are not in dispute, so those can be taken care of initially.

* * * *

[000818]

You're going to get an instruction on that. You're going to get an instruction on the expert testimony, but you're also going to get some instructions on

lesser included offenses of capital murder. And what's important for you to understand is that before you can consider a lesser included of capital murder, you must first, all 12, vote that this man is not guilty of capital murder before you can ever move on to the lesser included offenses.

As the Judge indicated to you, there is a lesser included offense of murder in the first degree. The difference in this one and capital murder is that the language of under circumstances manifesting extreme indifference to the value of human life isn't there. And that will be readily apparent when you take that instruction back. But like I said before, you don't even get to this instruction until all 12 of you are able to vote that you do not believe this man is [000819] guilty of capital murder, and we submit to you that he is.

There is a lesser after murder in the first degree, so if you all 12 vote that he is not guilty of murder in the first degree, then there is manslaughter. And that language is also different in that it says that he recklessly caused the death of Matthew McFadden, Jr.

There is a lesser beyond that that is negligent homicide and that says that he negligently caused the death of Matthew McFadden, Jr.

As I said at the beginning, this case is a lot like a lot of fires that have been set to distract from the truth of what really happened. But I believe that since you've heard all the testimony and you've listened to the witnesses and you've seen those autopsy photos and you've seen this photo of Matthew McFadden, Jr. when he was in the hospital, I think it's clear to you that the truth in this case is that this

man, this man, caused the death of Matthew McFadden, Jr. Thank you.

MRS. KIEL: May I proceed, Your Honor?

THE COURT: You may.

MRS. KIEL: Can I have a moment?

Ladies and gentlemen, thank you for your [000820] attention. First, I will let you note that on each of the charges in front of you, capital murder, murder in the first degree, manslaughter and negligent homicide, none of the elements say that if Alex Blueford lied, you should convict him. Nowhere. It's terrible that he lied. He lied over and over on the day of and to several people. And why would a person in Alex's shoes who is not wealthy, does not have his own lawyers at that time, lie to the police after he has caused or put in motion, I should say. I don't know that he's caused, a tragic event. Hmm. Because he's scared. And that does not make him a murderer. It is not pleasant but that does not make him a murderer. It doesn't matter how many times he has lied. And the fact that he even pointed the finger at Miss Tolbert which is very unpleasant, doesn't mean he's any more of a murderer.

And when we tell you that we believe that what Alex is guilty of is negligent homicide, that does not mean like a used car salesman that the State believes is capital murder and the Defense is saying it's negligent homicide. Oh, let's settle somewhere in the middle on murder first or reckless manslaughter. It's the truth that will be the defense. It's the truth that we've been pursuing all along.

[000821]

And you know what I expected Miss Abbott or I hope Mr. Jones on the second close, this is the only chance I get to speak to you, what I had expected them to say is, "Look at the medical records. Look all over at the medical records." Have they been referred to once by the State in detail? What we have done in this joint exhibit is flag any number of pages in here that backs up what we've been asking the ambulance people, the MEMS and Dr. Galaznik and Dr. Dick, when we asked about the intubation.

And you can say as many times as you want, all these doctors with all their experience, and it is true, a good doctor with 20 years of experience I would take over an intern any -- or I submit a person would take over an intern any day. But if you're not great at what you do, it doesn't matter how many years you've been doing it. And unfortunately, we'll go over each person one by one. But it's not just the years you have been at your position in this world as we all know. And if you're good at what you do, you're good. And if you're lousy at what you do, that's the way that is, too.

You are free to read and talk and consider all of the charges. But the State is correct that you must vote first on capital murder. Of course. But if you [000822] thought it was negligent homicide of you course you have a reasonable doubt on capital murder.

And that's why lesser includeds are just like these boxes I sometimes bring in. I don't have enough boxes. But here is your capital. Here is first degree. And here I'm running out. I don't have one for negligent, I'm sorry, and here is reckless. And they go

down. You must vote on capital first. It's no discussion. And then there's a lesser to consider. But if you consider that what Alex has done is negligent homicide, then you have a reasonable doubt on the greater. It's that simple. Please read and discuss all of the jury instructions when you go back to deliberate.

Now, I did say an accident in opening was criminal. The reason why we maintain that this is negligent homicide is because the wheels put in motion by smoking near this small innocent child is what ultimately, one way or another, led to his- - and it wasn't just a flinch. And it wasn't just a- -I'm not going to reenact it because I don't know exactly it happened. It wasn't just an elbow. Whatever happened in the room that morning led to something that Fat Man needed help and the ambulance was called.

* * * *

[State Rebuttal]

* * * *

[000847] Defense counsel talks about the lesser included [000848] offenses and I want to just run through those with you again. It's not a situation where you just lay everything out here and say, well, we have four choices. Which one does it fit the most? It's just as Miss Abbott told you to begin with, unless all 12 of you agree that this man's actions were not consistent with capital murder, then and only then would you go down to murder in the first degree. And, ladies and gentlemen, I will argue to you that you'll never need to take that step. You never need to consider murder in the first degree. You never need to consider manslaughter. You never need to consider negligent homicide. Because the actions of this man, if this is not an extreme indifference to the value of human life, then I don't know what would be.

Defense counsel ran through those scenarios of pointing a gun at someone like that. That's basically talking about purposeful conduct. And I don't want to get you mixed up in what the mental state is. It says knowingly and you have a definition for knowingly: Under circumstances manifesting extreme indifference to the value of human life. Slamming a child down into a floor, that is definitely manifest -- circumstances manifesting extreme indifference to the value of human life.

[000854]

* * * *

THE COURT: All right, Mr. Richard and Miss Scalia, you've been alternates in this and you've been very attentive and this will conclude your part of the trial. I want to thank you for your service. And when the jury gets up to go out, then you're free to go. You can stay if you wish, but you're free to go. But you cannot go back into the jury room with the jury.

Now, members of the jury, when you reach the jury room you will elect one of your members as foreperson. You will consider and complete the appropriate verdict form. I have several verdict forms here. First one is:

We, the Jury, find Alex Blueford guilty of capital murder. Signature blank for the foreman. Or,

We, the Jury, find Alex Blueford guilty of murder in the first degree. Signature blank for the foreman. Or,

We, the Jury, find Alex Blueford guilty of manslaughter. Signature blank for the foreperson. Or,

We, the Jury, find Alex Blueford guilty of negligent homicide. Signature blank for the [000855] foreperson. Or,

We, the Jury, find Alex Blueford not guilty of a homicide offense. Signature blank for the foreperson on it.

All 12 of you must agree on the verdict, but only the foreperson need sign the verdict form.

You will now retire to the jury room to deliberate.

The instructions and the exhibits will be gathered up and brought to you by the bailiff.

(THEREUPON, the jury retired to the jury room to consider its verdict on the guilt phase at 4:28 o'clock p.m.)

* * * *

[000867]

* * * *

(THEREUPON, at 7:22 o'clock p.m. the jury returned to the jury room; then at 8:43 o'clock p.m. the jury sent out a note. The jurors were brought into the courtroom; then the following proceedings occurred:)

THE COURT: Madam foreman?

JUROR NUMBER ONE: Yes, sir?

THE COURT: The Court has a note from the jury that says, (as read), "A juror would like to know what happens if we cannot agree on a charge at all."

First of all before I answer that, I would like to know without numbers --

JUROR NUMBER ONE: You would like to know what?

THE COURT: Without numbers.

JUROR NUMBER ONE: Without numbers.

THE COURT: Without divulging any one particular or any number of jurors or anything of that nature. The Court would like to know, are you not going to be able -- are you going to be able to reach an agreement?

JUROR NUMBER ONE: I don't believe so.

THE COURT: All right. To answer your question, [000868] it is in the interest of the State of Arkansas and of the defendant for you to reach an agreement in this case, if at all possible. A hung jury means a continuation of the case and a delay in the administration of justice. You should consider that this case will have to be decided by some jury, and in all probability upon the same testimony and evidence. It is

unlikely that the case will ever be submitted to 12 people more intelligent, more impartial or more competent to decide it. Under your oath as jurors, you have obligated yourselves to render verdicts in accordance with the law and the evidence.

In your deliberations you should weigh and discuss the evidence and make every reasonable effort to harmonize your individual views on the merits of the case. Each of you should give due consideration to the views and opinions of other jurors who disagree with your views and opinions. No juror should surrender his sincere beliefs in order to reach a verdict. To the contrary, the verdict should be the result of each juror's free and voluntary opinion.

By what I have said as to the importance of the jury reaching a verdict, I do not intend to suggest or require that you surrender your conscientious conviction, only that each of you make every sincere [000869] effort to reach a proper verdict.

Therefore, I request the jury to retire for further deliberation for a reasonable time in an attempt to reach a verdict.

If you are unable, you knock on the door and let the bailiff know that you need to see the Court. But at this point, the Court's going to ask you to go back for a reasonable time to see if you are able to reach a verdict.

JUROR NUMBER ONE: Okay.

(THEREUPON, at 8:47 o'clock p.m., the jurors returned to the jury room; then at 9:21 o'clock p.m. the jury sent out a note and the following proceedings occurred:)

THE COURT: All right, Court's back in session. Madam foreman, the Court has a note from the jury stating, (as read), "The jury cannot agree on any one charge in this case."

Are you telling this Court that you're hopelessly deadlocked on every charge?

JUROR NUMBER ONE: I'm not sure I understand what you mean, sir. To consider --

THE COURT: Well, you're obviously in your agreement -- any -- any charge, conviction of any charge, or even a not guilty finding has to be [000870] unanimous. All 12 have to agree.

JUROR NUMBER ONE: Right.

THE COURT: My question to you is, are you so deadlocked that you're not going to be able to reach an agreement no matter how long we stay here tonight?

JUROR NUMBER ONE: I would say that statement would be true, yes.

THE COURT: Well, that's not my statement, that's a question.

JUROR NUMBER ONE: Oh, the answer is yes, we are deadlocked.

THE COURT: All right, hopelessly?

JUROR NUMBER ONE: I would say so, sir, yes.

THE COURT: All right. If you have your numbers together, and I don't want names, but if you have your numbers I would like to know what your count was on capital murder.

JUROR NUMBER ONE: That was unanimous against that. No.

THE COURT: Okay, on murder in the first degree?

JUROR NUMBER ONE: That was unanimous against that.

THE COURT: Okay. Manslaughter?

JUROR NUMBER ONE: Nine for, three against.

THE COURT: Okay. And negligent homicide? [000871]

JUROR NUMBER ONE: We did not vote on that, sir.

THE COURT: Did not vote on that.

JUROR NUMBER ONE: No, sir. We couldn't get past the manslaughter. Were we supposed to go past that? I thought we were supposed to go one at a time.

MR. JONES: Your Honor, may we approach?

THE COURT: Yes, just a moment. Hold it.

(WHEREUPON, counsel for the State and Defense approached the bench and a conversation between Court and Counsel ensued, out of the hearing of the jury, as follows:)

THE COURT: All right, I propose I send them back.

MR. JONES: Well.

THE COURT: I mean, they haven't even taken a vote on it. I can't suggest that they do that, but I'm going to -- send her back. I don't think they've completed their deliberation.

MRS. KIEL: We would ask that they continue, Your Honor.

THE COURT: Pardon?

MRS. KIEL: We would ask that they continue. We'd ask that you re-read the Dynamite Charge.

THE COURT: You what?

MRS. KIEL: Would you ask -- we would ask that you [000872] re-read the Dynamite Charge.

MR. JONES: We'll defer to the Court.

THE COURT: Well.

MRS. KIEL: In the alternative --

THE COURT: I mean, under any reasonable circumstances, they would at least take a vote on negligent homicide. All right.

(THEN, in open court:)

THE COURT: All right, based upon what you have just informed the Court about, Madam Foreman, it would appear that perhaps you have not completed deliberations.

It again, it's in the interest of the State of Arkansas and of the defendant for you to reach an agreement in this case if at all possible. A hung jury means a continuation of the case and a delay in the administration of justice.

In other words, this case will have to be tried again.

You should consider that this case will have to be decided by some jury, and in all probability upon the same testimony and evidence. It is unlikely that the case will ever be submitted to 12 people more intelligent, more impartial or more competent to decide it. Under your oath as jurors, you have [000873] obligated yourselves to render verdicts in accordance with the law and the evidence.

In your deliberations you should weigh and discuss the evidence and make every reasonable effort to harmonize your individual views on the merits of the case. Each of you should give due consideration to

the views and opinions of other jurors who disagree with your views and opinions. No juror should surrender his sincere beliefs in order to reach a verdict. To the contrary, the verdict should be the result of each juror's free and voluntary opinion. By what I have said as to the importance of the jury reaching a verdict, I do not intend to suggest or require that you surrender your conscientious conviction, only that each of you make every sincere effort to reach a proper verdict.

Therefore, I request the jury to retire for further deliberation for a reasonable time in an attempt to reach a verdict.

I'm going to send you back at this point. And once you have completed your deliberations, you knock on the door and let the bailiff know.

(THEREUPON, at 9:28 o'clock p.m., the jury returned to the jury room.)

THE COURT: Do you think they got my drift?

[000874]

MR. JONES: I think so, Your Honor.

COURT REPORTER: Are we off the record now?

THE COURT: We're off.

All right, we're back on the record.

MRS. KIEL: Your Honor --

THE COURT: The jury is still out, but we're on the record.

MRS. KIEL: Your Honor, we would ask that the jury be given verdict forms and that they fill out verdict forms for those counts that they have reached a verdict on. And if there remains a hung jury on the remaining counts, then so be it.

But we also have an obligation to move forward where we can. And we're looking at, at least on the Defense side, expenditures of $10,000 or more at repeating this at a capital murder rate. And if the jury is decisive about the capital murder and the murder one, we would want those verdict forms submitted to them. That is our request.

MR. JONES: Your Honor, the State would argue against that. The State's position is they are still deliberating at this point and they have not made any findings. The Court was merely asking questions to gauge their temperature to see how long we will be here. It's -- I don't feel that it -- the State doesn't [000875] feel that it would be appropriate to -- to get any verdict form. Either -- it's all or nothing. They can come to an agreement or they cannot. And they have indicated now on two different occasions that they cannot come to an agreement. So I don't think we can --

THE COURT: Well, it's -- it's -- it's like changing horses in the middle of the stream. I mean, we have submitted the instructions and the verdict forms. And to go back and then change that at this time, frankly, would create a mistrial within itself and that would not be appropriate.

MRS. KIEL: Okay, thank you.

MR. JONES: Now, Your Honor, if the -- if Defense counsel is asking this Court to declare a mistrial at this point because they cannot reach a verdict, then I think that's a separate issue and the State would likely join in that. I mean, they have been out for quite some time.

But I don't think, as the Court just stated, I don't think we can piecemeal this out. It's all or nothing.

MR. TOBLER: We are not asking for a mistrial at this point, Your Honor.

THE COURT: Well, the Court is going to declare [000876] one if the jury doesn't make a decision. I mean, they have been out hours and hours and hours now. And they have indicated twice that they're hopelessly deadlocked. I don't think they have an understanding of really that they don't have to get past every charge unanimously before they can move to the next charge. But I'm not in the jury room and I don't tell the jury -- I never tell the jury what to do.

MR. JONES: Yes, sir.

THE COURT: Except in a Dynamite Charge. So I'm going to give them a few more minutes and then I'm going to have the bailiff bang on the door to see if they're making any progress.

MRS. KIEL: Okay.

THE COURT: And then we will -- we will proceed accordingly.

MRS. KIEL: Thank you.

MR. JONES: Thank you, Your Honor.

(THEREUPON, at 9:59 o'clock p.m., the jury returned to the courtroom; then the following proceedings occurred:)

THE COURT: Madam Foreman, has the jury reached a verdict?

JUROR NUMBER ONE: No, it has not, sir.

THE COURT: Madam Foreman, there seems to be a [000877] lot of confusion on the part of the -- of the jury about some of the instructions. And because of the confusion and because of the timeliness and the amount of hours that has gone by without being able

to reach a verdict, the Court is going to declare a mistrial.

You can take your badges off. Make sure that all of the exhibits are back in here, and the instructions. Leave the instructions. The copies of the instructions that you had, did you leave them in there?

JUROR NUMBER ONE: Yes, all the copies are in there. This is the original.

THE COURT: All right, in there.

I want to thank you so much for the time that you've spent on this. You've spent three extremely long days and I'm sorry that you weren't able to reach a verdict. But I do thank you for your service and you are excused. Call in whenever you're supposed to call in for your next jury trial.

JUROR NUMBER ONE: And the notes that we've taken?

THE COURT: Your notes you take with you and destroy. If you wish to give them to the bailiff, then the bailiff will destroy them.

JUROR NUMBER ONE: The bailiff will destroy them.

PETITIONER'S BRIEF

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No. 10-1320

In the Supreme Court of the United States

ALEX BLUEFORD,
Petitioner,

v.

STATE OF ARKANSAS,
Respondent.

On Writ of Certiorari to the Arkansas Supreme Court

BRIEF FOR PETITIONER

WILLIAM R. SIMPSON, JR.
SHARON KIEL
CLINT MILLER
SIXTH JUDICIAL DISTRICT (ARKANSAS) PUBLIC DEFENDERS OFFICE
201 S. Broadway, Ste. 210
Little Rock, AR 72201
(501) 340-6120

CLIFFORD M. SLOAN
Counsel of Record
GEOFFREY M. WYATT
DAVID W. FOSTER
MOSHE SPINOWITZ
SKADDEN, ARPS, SLATE, MEAGHER & FLOM LLP
1440 New York Ave., N.W.
Washington, DC 20005
(202) 371-7000
cliff.sloan@skadden.com

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QUESTION PRESENTED

Whether, if a jury deadlocks on a lesser-included offense, the Double Jeopardy Clause bars reprosecution of a greater offense after a jury announces that it has voted against guilt on the greater offense.

TABLE OF CONTENTS

Page

Question Presented i

Table of Authorities iii

Decisions Below 1

Jurisdiction 1

Constitutional Provisions Involved 1

Statement of the Case 1

Introduction and Summary of Argument 14

Argument 17

I. The Jury Explicitly Acquitted Blueford of Murder. 17

II. The Acquittal-First Instructions Establish that the Jury Acquitted Blueford of Murder. 24

III. No Murder Retrial Is Permitted Because the First Jury Had a Full Opportunity to Return a Verdict on Those Charges. 30

Conclusion 34

TABLE OF AUTHORITIES

Cases

Abney v. *United States*,
431 U.S. 651 (1977) 14, 15, 26, 27

Allen v. *United States*,
164 U.S. 492 (1896) 9

Arizona v. *Washington*,
434 U.S. 497 (1978) 15, 16, 23, 29, 33

Benton v. *Maryland*,
395 U.S. 784 (1969) 17, 19, 20, 24

Burks v. *United States*,
437 U.S. 1 (1978) 16

Crist v. *Bretz*,
437 U.S. 28 (1978) 19, 28

Downum v. *United States*,
372 U.S. 734 (1963) 29

Green v. *United States*,
355 U.S. 184 (1957) 14, 15, 20, 24, 27, 30, 31, 32

Hudson v. *Louisiana*,
450 U.S. 40 (1981) 22

Ireland's Case,
7 How. St. Tr. 79 (1678) 23

People v. *Richardson*,
184 P.3d 755 (Colo. 2008)..... 27

Price v. *Georgia*,
398 U.S. 323 (1970) 15, 27, 30, 31, 32

The Queen v. *Charlesworth*, 1861,
121 Eng. Rep. 786 (Q.B.) 23

Renico v. *Lett*,
130 S. Ct. 1855 (2010) 29

Smalis v. *Pennsylvania*,
476 U.S. 140 (1986) 22

Smith v. *Massachusetts*,
543 U.S. 462 (2005) 18, 22, 23, 32

State v. *Tate*,
773 A.2d 308 (Conn. 2001) 27

Tibbs v. *Florida*,
457 U.S. 31 (1982) 23

United States v. *Ball*,
163 U.S. 662 (1896) 21, 24, 28

United States v. *Martin Linen Supply Co.*,
430 U.S. 564 (1977) 14, 17, 18, 20, 21, 22, 24, 28

United States v. *Perez*,
9 Wheat. 579 (1824) 16, 29, 32

United States v. *Scott*,
437 U.S. 82 (1978) 17, 19, 20, 21

United States v. *Tsanas*,
572 F.2d 340 (2d Cir. 1978) 25

United States v. *Wilson*,
420 U.S. 332 (1975) 21, 29

Walker v. *State*,
825 S.W.2d 822 (Ark. 1992) 13

Weeks v. *Angelone*,
528 U.S. 225 (2000) 25, 26

Whitebread's Case,
7 How. St. Tr. 311 (1679) 23

Yeager v. *United States*,
129 S. Ct. 2360 (2009) 19, 20

Constitutional and Statutory Provisions

U.S. Const. Amdt. V 1, 17

U.S. Const. Amdt. XIV 1

28 U.S.C. § 1257(a) 1

Other Authorities

William Blackstone,
Commentaries (1803 ed.) 19

David S. Rudstein, Double Jeopardy: A
Reference Guide to the United States
Constitution (2004) 23

DECISIONS BELOW

The opinion of the Arkansas Supreme Court is reported at 2011 Ark. 8, and the order of the trial court is not reported. The decisions are reprinted in the Appendix to the Petition for Certiorari ("Pet. App.") at Pet. App. 1a and Pet. App. 15a.

JURISDICTION

The Arkansas Supreme Court rendered judgment on January 20, 2011, and denied rehearing on February 24, 2011. Pet. App. 1a, 17a. A petition for certiorari was filed on April 25, 2011, and granted on October 11, 2011. This Court has jurisdiction pursuant to 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment of the United States Constitution provides in relevant part: "No person shall * * * be subject for the same offence to be twice put in jeopardy of life or limb * * * ."

The Fourteenth Amendment of the United States Constitution provides in relevant part: "No State shall * * * deprive any person of life, liberty, or property, without due process of law * * * ."

STATEMENT OF THE CASE

The state of Arkansas charged Alex Blueford with capital murder. It accused him of intentionally causing the death of Matthew McFadden, Jr., the 20-month-old son of his girlfriend Kimberly Tolbert. App. 42; Arkansas Supreme Court Record ("ASCR") at 115-119. At trial, the state also charged lesser-

included offenses of first-degree murder, manslaughter, and negligent homicide. [1]

1. **The trial.** Evidence at trial established that, on the morning of November 28, 2007, Blueford, his girlfriend Tolbert, and Tolbert's son McFadden awoke and prepared for the day. ASCR at 121-122. The three had been living together at the house of Stacy Clay, Blueford's friend, for two months. *Id.* at 119-120. It was Tolbert's day off from work, and she had agreed to take her son's aunt to a doctor's appointment. *Id.* at 121. As he often had done in the preceding two months without incident, Blueford remained at home to watch McFadden. *Id.* at 123, 140-142. Tolbert testified that she had no reason to worry about leaving her son with Blueford. *Id.* at 139. Clay also remained in the apartment. *Id.* at 157-159.

After Tolbert left, Clay observed Blueford caring for McFadden. McFadden had been crying that morning, *id.* at 154-155, and Blueford attempted to calm him down, *id.* at 158. A short while later, according to Clay, Blueford and Clay both told McFadden to stop jumping on a pair of small mattresses on the floor that served as McFadden's bed. *Ibid.* Clay went into her room for ten to fifteen minutes, and, when she came out, she noticed that McFadden seemed to be sleeping in the bedroom. Based on her experience with her own children, Clay found it odd that McFadden had fallen asleep so quickly after being active, and she asked Blueford, who was in the living room, to check on him. *Id.* at

---

[1] The state waived the death penalty on the capital murder charge. App. 19.

159-160. Blueford went into the bedroom and reported that McFadden was sleeping. *Id.* at 160. Clay asked Blueford to check on McFadden again. *Ibid.*

Blueford again went into the room, returned with McFadden in his arms, and reported that McFadden was not breathing. *Ibid.* Clay tried unsuccessfully to wake McFadden. At Blueford's request, Clay immediately called 911 and sought help for the child. *Id.* at 161. Medical personnel arrived and confirmed that McFadden was having difficulty breathing. *Id.* at 619. They rushed him to the hospital, and, two days later, he died. *Id.* at 132.

What happened to McFadden during the ten to fifteen minutes when Clay was in her room alone was hotly disputed at trial. The state theorized that Blueford viciously injured McFadden by slamming him into the mattresses on the floor. *Id.* at 276. The state's case regarding the cause of death rested entirely on circumstantial evidence—principally, the autopsy report by Dr. Adam Craig, a state medical examiner. The state did not offer any evidence of previous abuse of McFadden by Blueford.

Dr. Craig was the state's primary witness at trial. Dr. Craig admitted that he is not board certified in anatomical pathology, despite five attempts to pass the board exam. *Id.* at 281-281A, 285-286. Dr. Craig nevertheless performs autopsies as part of his job as a medical examiner for the Arkansas State Crime Lab, and he performed the autopsy on McFadden. *Id.* at 282, 302-303. Based on that autopsy, he concluded that the cause of death was a "closed head injury." *Id.* at 321-323. He further opined that the death was a homicide, based on the "severity of the injuries" visible from scalp bruises and seen in the two slides

made of McFadden's brain, and the absence of any other "reasonable explanation" in the information he received from law enforcement. *Id.* at 321-323, 373-378. Dr. Craig rejected the possibility that McFadden's injury could have been caused by an accident or fall, citing a dated medical position paper. *Id.* at 392-394, 414-415. He admitted that he was only "vaguely aware" of recent literature documenting the possibility that even very short falls can cause fatal head injuries in children. *Id.* at 390-392.

Blueford's counsel extensively cross-examined Dr. Craig. She elicited testimony that Dr. Craig had failed to follow certain protocols in performing the autopsy and that he had failed even to look at the entire medical file for McFadden, including x-rays that had been taken while he was still alive. *Id.* at 369. Blueford's counsel also established that Dr. Craig was unfamiliar with position papers of the American Pediatric Association regarding traumatic brain injury and leading medical articles. *Id.* at 390-394. She likewise established that Dr. Craig was not qualified in accident reconstruction and had never received even minimal training in it. *Id.* at 383.

The state's evidence included testimony from police detectives. They testified that Blueford had given inconsistent explanations about the events leading to McFadden's death. See *id.* at 426-431. They also testified that Blueford had left the state after an arrest warrant was issued and that he was apprehended in Texas and taken into custody. *Id.* at 434.[2]

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[2] The state additionally presented testimony from medical professionals at the hospital where McFadden

At the end of the state's case, Blueford's counsel moved to dismiss the capital murder charge on the ground of insufficient evidence. She argued that "the State has failed to prove even the manner of death in this case was a homicide," and that "[t]he autopsy report * * * was woefully replete with professional errors." *Id.* at 609. In denying the motion, the trial judge observed that "certainly, the State's case is circumstantial at best and probably this may be a lesser included offense case. That's a jury question." *Id.* at 610. Blueford's counsel then moved for a finding of insufficient evidence on the lesser-included offense of first-degree murder, and again the trial judge denied the motion. *Id.* at 611. Blueford's counsel likewise moved for a finding of insufficient evidence on manslaughter on the ground that "[t]here's a complete vacuum of evidence," and that "the autopsy has not given us a firm foundation at all as to what the manner of death was and the cause of death." *Id.* at 613. Once again, the court ruled that "of course, it's circumstantial, but the Court feels that it is a question for the jury." *Ibid.*

As the trial moved to the defense case, Blueford took the stand and testified. He explained that McFadden's injuries resulted from a tragic accident. Blueford recounted the events of that morning. At one point, he went into the bedroom he shared with Tolbert and McFadden, sat on the bed, began talking

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was treated, as well as testimony from Tolbert that included descriptions of Blueford's lack of communication with her after the incident. ASCR at 134-135, 194-280, 538-605. Tolbert also testified that she and others called McFadden "Fat Man" as a nickname. *Id.* at 115.

on the phone to his cousin, and smoked a marijuana cigarette. *Id.* at 648-649. Continuing to talk on the phone, he lit a tobacco cigarette and placed it in an ashtray by the bed. *Ibid.* While Blueford's back was to him, McFadden grabbed the still-lit cigarette and playfully climbed on Blueford, bringing the cigarette near his face. *Id.* at 649. The heat from the cigarette surprised Blueford, causing him to jump and turn, striking McFadden's head in the process. *Id.* at 650, 691. McFadden crashed into a table and fell to the floor. *Id.* at 650-651. Although he initially thought that McFadden was unharmed, Blueford later realized something was wrong. *Id.* at 651-652. He tried to revive McFadden and asked Clay to call 911. *Id.* at 653. Blueford admitted that he lied to police about what had happened and that he had left the state after the arrest warrant was issued, explaining that he was a former convict who had previously been incarcerated and feared returning to prison. *Id.* at 644-647, 671-672.

Blueford's defense was supported by two expert medical witnesses. The first was Dr. Robert Bux, the head medical examiner for El Paso County, Colorado. *Id.* at 452. Dr. Bux is board certified in anatomical, clinical, and forensic pathology. *Ibid.* He has published in the *Journal of the American Medical Association*, among other places, and has worked on international matters, including service for the International War Crimes Tribunal for the former Yugoslavia. *Id.* at 454-456.

Dr. Bux was highly critical of Dr. Craig's methods and conclusions. He testified that, in his office, no one who "intend[ed] to work there for a long time" could turn in an autopsy like Dr. Craig's. *Id.* at 471.

In particular, Dr. Bux explained that ten to twenty slides of McFadden's brain should have been taken (rather than the two taken by Dr. Craig), and that even the slides that were taken were of diminished value because Dr. Craig had not identified the side of the brain from which they were taken. *Id.* at 465, 471-472, 489-492. He also testified that slides should have been made from McFadden's cervical spinal cord to help determine whether a fall contributed to the injury, *id.* at 477, and that blood-thinners administered to preserve McFadden's organs for donation could have produced some of the symptoms Dr. Craig attributed to McFadden's injuries, *id.* at 480-481. Dr. Bux testified that Blueford's account of the event, or any number of other scenarios, could explain McFadden's injury, *id.* at 481, 504-505. Because of the botched autopsy, "[t]here's no way as a forensic pathologist I can tell you which happened," *id.* at 482. Nor, in his professional opinion, could Dr. Craig. See *id.* at 491 ("He does not know the mechanism of death, period.").

Dr. John Galaznik, a board-certified pediatrician with thirty years of experience at the University of Alabama, also testified on Blueford's behalf. *Id.* at 694-695. Like Dr. Bux, Dr. Galaznik testified that the available medical evidence was entirely consistent with Blueford's account of the accident. He explained that the paper on which Dr. Craig relied had instructed pediatricians to presume abuse in brain injury cases when a child's guardians claimed the child had fallen based on the belief that short falls never cause brain injury. *Id.* at 726. But the last decade of research had conclusively rejected that view, demonstrating that children can suffer fatal head trauma from short falls. *Id.* at 725-735. He

also expressly rejected the state's theory that Blueford slammed McFadden into mattresses, emphasizing that the same scenario had been examined in literature on biomechanical effects, and that these studies, in his view, established that the mattress-slamming scenario "would not cause the injuries in this case." *Id.* at 765-766.

In his testimony, Blueford adamantly denied any intent to injure McFadden, but he nonetheless accepted responsibility. He testified that he wished he had "been more attentive," *id.* at 691, and his counsel asked the jury to convict him of negligent homicide, *id.* at 837-839.

2. **The jury deliberation.** After the close of evidence, the trial court instructed the jury to consider four charges: capital murder and the lesser-included offenses of first-degree murder, manslaughter, and negligent homicide. App. 51.

The court made clear that the jury was to consider the charges against Blueford one at time, beginning with the greatest offense and proceeding to the next greatest offense only if the jury found the defendant not guilty of the greater offense. Thus, only if the jury had "a reasonable doubt of the defendant's guilt on the charge of capital murder" would it "consider the charge of murder in the first degree," and so on with each lesser-included offense. *Id.* at 51-52.

The state repeatedly emphasized this instruction in closing. The state told the jury that it was "important for you to understand" that, "before you can consider a lesser included of capital murder, you must first, all 12, vote that this man is not guilty of capital murder before you can ever move on." *Id.* at

55; see also *ibid.* ("[L]ike I said before, you don't even get to this [first-degree murder] instruction until all 12 of you are able to vote that you do not believe this man is guilty of capital murder * * * .").

Blueford's counsel referred to the same instruction in her closing and stated that "the State is correct that you must vote first on capital murder." *Id.* at 57. She also suggested that the jury could "consider all of the charges." *Ibid.* In rebuttal, the state strongly objected to any suggestion that the jury could "just lay everything out here and say, well, we have four choices. Which one does it fit the most?" *Id.* at 59. Instead, the state emphasized, "unless all 12 of you agree that this man's actions were not consistent with capital murder, then and only then would you go down to murder in the first degree." *Ibid.*

After retiring and deliberating for four hours, the jury sent the court a note asking "what happens if we cannot agree on a charge at all." *Id.* at 62. The judge summoned the jury. Upon questioning by the court, the forewoman reported that she did not believe the jury would be able to reach an agreement, and the court gave an *Allen* charge.[3] The jury resumed its deliberations for half an hour. *Id.* at 63. It then sent another note stating that it "cannot agree on any one charge in this case." *Id.* at 64. The court again summoned the jury, and, in response to the forewoman's statement that the jury remained deadlocked, the court asked for the jury's vote on each charge:

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[3] See *Allen* v. *United States*, 164 U.S. 492, 501-502 (1896).

THE COURT: All right. If you have your numbers together, and I don't want names, but if you have your numbers I would like to know what your count was on capital murder.

JUROR NUMBER ONE: That was unanimous against that. No.

THE COURT: Okay, on murder in the first degree?

JUROR NUMBER ONE: That was unanimous against that.

THE COURT: Okay. Manslaughter?

JUROR NUMBER ONE: Nine for, three against.

THE COURT: Okay. And negligent homicide?

JUROR NUMBER ONE: We did not vote on that, sir.

THE COURT: Did not vote on that.

JUROR NUMBER ONE: No, sir. We couldn't get past the manslaughter. Were we supposed to go past that? I thought we were supposed to go one at a time.

Id. at 64-65. The court thought that the jury should continue deliberating. Blueford's counsel supported continued deliberations and requested a re-reading of the "Dynamite Charge." *Id.* at 65. The court agreed and gave the charge, and the jury resumed deliberations. *Id.* at 66-67.

When the jury left, Blueford's counsel asked for verdicts on the offenses for which the jury had reached a decision. She requested that "the jury be

given verdict forms and that they fill out verdict forms for those counts that they have reached a verdict on. And if there remains a hung jury on the remaining counts, so be it. * * * [We] have an obligation to move forward where we can. * * * And if the jury is decisive about the capital murder and the murder one, we would want those verdict forms submitted to them. That is our request." *Id.* at 67-68. The state objected to accepting the jury's statement of acquittal on capital murder and first-degree murder, contending that "they are still deliberating at this point" and that the verdict must be "all or nothing." The court denied Blueford's request. *Id.* at 68.[4]

The state then suggested that it would join a request for a mistrial on all charges. *Ibid.* Blueford's counsel opposed, making clear that "[w]e are not asking for a mistrial at this point." *Id.* at 69. The court stated its inclination to agree with the government and grant a mistrial: "the Court is going to declare one if the jury doesn't make a decision. I mean, they have been out hours and hours and hours now. And they have indicated twice that they're hopelessly deadlocked." *Ibid.* When the jury returned half an hour later, the court immediately discharged the jury:

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[4] At the beginning of deliberations, the court had provided the jury with five verdict forms. On four of the forms, the jury could return a verdict of "guilty" on one of the offenses (*e.g.*, "We, the Jury, find Alex Blueford guilty of capital murder"; "We, the Jury, find Alex Blueford guilty of first degree murder"; and so on). App. 60. On the fifth form, the jury could return a verdict of acquittal that would apply to all four offenses: "We, the jury, find Alex Blueford not guilty of a homicide offense." *Ibid.*

> THE COURT: Madam Foreman, has the jury reached a verdict?
>
> JUROR NUMBER ONE: No, it has not, sir.
>
> THE COURT: Madam Foreman, there seems to be a lot of confusion on the part of the * * * jury about some of the instructions. And because of the confusion and because of the timeliness and the amount of hours that has gone by without being able to reach a verdict, the Court is going to declare a mistrial.

Id. at 69-70.

3. **The motion to dismiss the murder charges on retrial.** On retrial, the state sought to pursue the capital murder charge despite the first jury's declaration that it was "unanimous against" capital murder and "unanimous against" first-degree murder. ASCR at 57. Blueford's counsel moved to dismiss the murder charges on Double Jeopardy grounds. See App. 29-30. His motion cited the jury forewoman's statement that "the jury had unanimously found Defendant Blueford not guilty of capital murder and not guilty of first degree murder," as well as the jury instructions that required the jury to acquit on greater charges before it reached the manslaughter charge. ASCR at 87; see also *id.* at 90 (emphasizing that the jury was given "step-down" instructions that barred it from considering lesser-included offenses until it had definitively resolved the greater offenses).

The trial court denied the motion. Pet. App. 15a-16a. It agreed that the jury foreperson had been clear about the jury's vote to acquit on capital murder and first-degree murder: "The Court finds, after review of the transcript of Defendant Blueford's first

trial, that the jury foreperson was explicit that the jury was unanimous in voting against finding Defendant Blueford guilty of capital murder and first degree murder." *Ibid.* But the Court nevertheless denied Blueford's Double Jeopardy motion on those two charges for which the jury had been "explicit" in their unanimous vote: "[T]here were no 'findings' or 'verdicts' as intended by the law. The jury was unable to complete its deliberations and this Court had to declare a mistrial." *Ibid.*

4. **The appeal**. Blueford took an interlocutory appeal to the Arkansas Supreme Court. The court affirmed. It stated that neither the forewoman's explicit announcement of unanimous votes of not guilty on the two murder charges nor the structured jury instructions produced an acquittal on those charges because "a judgment is not valid until entered of record." *Id.* at 10a.

The Arkansas Supreme Court also recognized that Blueford had requested verdict forms on capital murder and first-degree murder. The court noted that some states, which it viewed as a minority, have held that "double jeopardy requires a partial verdict of acquittal as to the greater offenses if the jury is deadlocked only as to the lesser offenses." *Id.* at 13a. But the Arkansas Supreme Court disagreed with these states, stating that it was "simply unpersuaded by the underlying rationale" of the other states because, in its view, a hung jury "'produce[s] no verdict at all.'" *Id.* at 13a-14a (quoting *Walker* v. *State*, 825 S.W.2d 822 (Ark. 1992)).

This Court granted a writ of certiorari.

INTRODUCTION AND SUMMARY OF ARGUMENT

The Double Jeopardy Clause is a cornerstone of the Bill of Rights' protection of personal liberty against government abuse. Arkansas's attempt to retry Blueford on capital murder and first-degree murder conflicts with the core principle of the Double Jeopardy Clause—that a man who has been acquitted cannot be made "to 'run the gantlet' a second time." *Green* v. *United States*, 355 U.S. 184, 190 (1957); *Abney* v. *United States*, 431 U.S. 651, 662 (1977).

The jury's acquittals on capital murder and first-degree murder are clear and unequivocal. Blueford is entitled to Double Jeopardy protection on the murder charges for three separate and independent reasons.

First, the jury's pronouncement of a unanimous verdict on the murder charges in open court is an acquittal on those charges as a matter of federal Double Jeopardy principles. This Court has squarely—and repeatedly—rejected the arguments on which the state courts relied, expressly holding that "what constitutes an 'acquittal' is not to be controlled by the form of the * * * action." *United States* v. *Martin Linen Supply Co.*, 430 U.S. 564, 571 (1977). Instead, what matters is whether the jury's announcement "actually represents a resolution * * * of some or all of the factual elements of the offense charged." *Ibid.* On this record, it clearly does. The forewoman's announcement was plain and unmistakable; nothing in the record casts any doubt on its accuracy or finality; and the state court's refusal to formally enter the verdict on the record does not permit the state to re-

try Blueford for the offenses on which the jury has already returned a verdict of acquittal. See *Arizona* v. *Washington*, 434 U.S. 497, 507-508 (1978).

Second, the jury instructions establish acquittals on the greater offenses by virtue of the jury's deadlock on the lesser-included offense. This Court repeatedly has concluded that a jury has reached a verdict based on what is necessarily implied by its actions—for example, when the jury returns a guilty verdict on one of two charges but is silent on the other, *Green* v. *United States*, 355 U.S. 184; *Price* v. *Georgia*, 398 U.S. 323 (1970), or where the jury instructions give clear meaning to an ambiguous verdict, *Abney* v. *United States*, 431 U.S. 651. The record in this case makes the jury's determination of Blueford's innocence on the two greater offenses pellucidly clear: under the trial court's instructions, the jury could not reach the manslaughter charge unless and until it had resolved the murder charges in Blueford's favor. The instructions in this case reflect "acquittal-first" or "hard-transition" instructions. When a jury deadlocks on a lesser-included offense after receiving acquittal-first instructions, it has acquitted on the greater offense.

Third, Double Jeopardy principles bar retrial on the capital murder and first-degree murder charges because the jury "was given a full opportunity to return a verdict" on those charges, and "no extraordinary circumstances appeared which prevented" it from doing so. *Green*, 355 U.S. at 191. The jury deliberations did not result in a deadlock or a conviction on the capital murder and the first-degree murder charges; nothing in the jury's consideration of the murder charges satisfies the narrow exception

of "manifest necessity" that permits a retrial for the same offense. *United States* v. *Perez*, 9 Wheat. 579, 580 (1824).

This case presents a danger at the heart of the Double Jeopardy Clause. "The prohibition against double jeopardy unquestionably forbids the prosecutor to use the first proceeding as a trial run of his case." *Arizona* v. *Washington*, 434 U.S. at 508 (citation and internal quotation marks omitted). The Double Jeopardy Clause "forbids a second trial for the purpose of affording the prosecution another opportunity to supply evidence which it failed to muster in the first proceeding. This is central to the objective of the prohibition against successive trials." *Burks* v. *United States*, 437 U.S. 1, 11 (1978) (footnote omitted).

This case is a classic example of that paradigmatic problem. The state's murder charges against Blueford were in a shambles. The government's theory relied extensively on the medical examiner's conclusions about what, in his view, must have happened. The medical examiner's reliability and credibility were destroyed, however, both by cross-examination and by renowned medical experts who lambasted the examiner's methodology and conclusions. At a second trial against Blueford on the murder charges, the state would have the opportunity to try again and revamp its presentation (perhaps, for example, by declining to use the now-discredited medical examiner and substituting a different witness in his place).

The Double Jeopardy Clause prohibits giving the state the second chance that it seeks on its failed murder charges. The Double Jeopardy Clause pro-

tects a defendant from being "subject for the same offence to be twice put in jeopardy." Amdt. V.

ARGUMENT

I. The Jury Explicitly Acquitted Blueford of Murder.

The Fifth Amendment—as incorporated against the states by the Fourteenth Amendment, see *Benton* v. *Maryland*, 395 U.S. 784 (1969)—bars the state from twice putting a person in jeopardy for the same offense. Whatever the outer limits of the Double Jeopardy Clause's protections, at its very core it places one clear limit on the state's power: the state may not retry a defendant for an offense after a jury has acquitted the defendant for that same offense. See *United States* v. *Scott*, 437 U.S. 82, 91 (1978). As this Court has explained, "[p]erhaps the most fundamental rule in the history of double jeopardy jurisprudence has been that [a] verdict of acquittal * * * could not be reviewed, on error or otherwise, without putting [a defendant] twice in jeopardy, and thereby violating the Constitution." *United States* v. *Martin Linen*, 430 U.S. at 571 (citation and internal quotation marks omitted) (second and third alterations in original). Yet that is precisely what the State of Arkansas proposes to do in retrying Blueford for capital murder and first-degree murder after the jury in his first trial unanimously concluded, and declared in open court, that Blueford was not guilty of those offenses.

The jury's resolution of the charges of capital and first-degree murder could not have been clearer. After the jury was called back into court following extended deliberations, the judge said to the jury, "I

would like to know what your count was on capital murder." App. 64. The forewoman replied: "[t]hat was unanimous against that." *Ibid.* In response to the same question from the judge about the jury's vote on first-degree murder, the forewoman stated: "That was unanimous against that." *Id.* at 65. The record is clear: the judge asked point blank what the jury's count was on capital and first-degree murder and the jury answered, in both instances, "unanimous against." The jury's statements "represent[ed] a resolution * * * of some or all of the factual elements of the offense charged." *Martin Linen*, 430 U.S. at 571. The jury did not express any uncertainty as to its determination on the murder charges, nor did it ever indicate a desire to reconsider its expressed conclusion. Once a jury has offered its clear, express, and final determination of a defendant's innocence on certain charges, and the jury has been discharged, the state's opportunity to try the defendant for those offenses has terminated. Accordingly, the state cannot now subject Blueford a second time to jeopardy for offenses on which the jury's determination of his innocence was clear, express, and final.[5]

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[5] With regard to the possibility of an error, prior to formal entry of a judgment, a court can "immediate[ly] repair * * * a genuine error in the announcement of an acquittal, even one rendered by a jury," without violating the Double Jeopardy Clause. *Smith* v. *Massachusetts*, 543 U.S. 462, 474 (2005). This case presents no such issue of "immediate repair" because there is no indication that the jury ever doubted or wished to reconsider its verdict on the murder charges at any time prior to the judge's discharge of the jury.

Arkansas's attempt to retry Blueford for the murder offenses notwithstanding the jury's unambiguous acquittal flies in the face of the language, history, and purpose of the Double Jeopardy Clause. Historically, the Double Jeopardy Clause has its roots "in the three common-law pleas of *autrefois acquit*, *autrefois convict*, and pardon." *Scott*, 437 U.S. at 87. See also 5 William Blackstone, Commentaries 335-336 (1803 ed.). A defendant, having previously been acquitted or convicted of a crime, could raise such a plea as a bar to retrial. These longstanding protections against retrial following a jury's verdict "can be traced to Greek and Roman times, and [they] became established in the common law of England long before this Nation's independence." *Benton*, 395 U.S. at 795. In this country, Double Jeopardy protections quickly emerged as "fundamental to the American scheme of justice." *Id.* at 796.

The historical limits on the states' power to retry defendants serve to protect what the Court has described as "two vitally important interests." See *Yeager* v. *United States*, 129 S. Ct. 2360, 2365 (2009). First, the Double Jeopardy Clause serves a simple interest in "the preservation of 'the finality of judgments.'" *Id.* at 2366 (quoting *Crist* v. *Bretz*, 437 U.S. 28, 33 (1978)). Second, as the Court has explained time and again:

> "The underlying idea, one that is deeply ingrained in at least the Anglo-American system of jurisprudence, is that the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby

> subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty." *Green* v. *United States*, 355 U.S. at 187-188.

See also *Yeager*, 129 S. Ct. at 2365-2366 (same); *Scott*, 437 U.S. at 87 (same); *Martin Linen*, 430 U.S. at 569 (same); *Benton*, 395 U.S. at 795-796 (same).

The State of Arkansas proposes to retry Blueford for capital and first-degree murder in disregard of both of these interests. Despite the fact that the jury reached a unanimous conclusion on both of those offenses, the state wishes to give no effect to those verdicts. Despite Blueford having already faced the "expense and ordeal" of a first trial on murder charges, and despite a jury of his peers having unanimously found him not guilty of the crimes of capital and first-degree murder, the state wishes to make him "run the gantlet" yet again on those charges. The Double Jeopardy Clause is designed to prevent just such a spectacle.

The Arkansas Supreme Court concluded that the state could retry Blueford for capital and first-degree murder because "no formal acquittal was entered of record in this case," and because, "for an acquittal to be final[,] it must be entered of record." Pet. App. 10a. In fact, however, this Court has rejected that position, and has consistently held that the Double Jeopardy Clause may bar retrial regardless whether a formal judgment of acquittal has been entered.

As the Court first explained over a century ago in *United States* v. *Ball*, 163 U.S. 662 (1896), "the reception of the verdict and discharge of the jury is but a ministerial act, involving no judicial discretion[.] * * * However it may be in England, in this country a verdict of acquittal, although not followed by any judgment, is a bar to a subsequent prosecution for the same offence." *Id.* at 671. See also *United States* v. *Wilson*, 420 U.S. 332, 346-347 (1975). *Ball* thus made clear that a potential procedural defect in the return of a jury's verdict—and any resulting defect in the judgment—does not affect the finality of the jury's verdict under the Double Jeopardy Clause.[6]

Indeed, this Court has recognized that, in light of the interests protected by the Double Jeopardy Clause, "the law attaches particular significance to an acquittal," *Scott*, 437 U.S. at 91. As a result, what qualifies as an acquittal for Double Jeopardy purposes is to be assessed based on the substance, and not the form, of the acquittal. "[W]hat constitutes an 'acquittal' is not to be controlled by the form of the [fact finder's] action. Rather we must determine whether the ruling of the [fact finder], whatever its label, actually represents a resolution * * * of some or all of the factual elements of the offense charged." *Martin Linen*, 430 U.S. at 571.

The Court has applied this principle repeatedly. For example, where it was "plain that the District

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[6] The Court likewise held in *Ball* that a verdict of acquittal returned on a faulty indictment was final and barred retrial on the offense charged notwithstanding the procedural defect infecting the proceeding. *United States* v. *Ball*, 163 U.S. at 669-670.

Court * * * [had] evaluated the Government's evidence and determined that it was legally insufficient to sustain a conviction," this Court has concluded that further proceedings were barred under the Double Jeopardy Clause. *Id.* at 572 (prohibiting a government appeal). See also *Smith* v. *Massachusetts*, 543 U.S. at 468-469 ("Massachusetts' characterization of the required finding of not guilty as a legal rather than factual determination is, 'as a matter of double jeopardy law, * * * not binding on us.'" (quoting *Smalis* v. *Pennsylvania*, 476 U.S 140, 144 n.5 (1986))).

Even the complete absence of a state-law mechanism for entering a judgment of acquittal will not prevent a verdict of acquittal from having final effect for double jeopardy purposes. In *Hudson* v. *Louisiana*, 450 U.S. 40 (1981), the trial judge had entered a judgment for a *new trial* upon determining that the prosecution's evidence was legally insufficient to convict the defendant. Under Louisiana state law, the trial judge was "not authorize[d] * * * to enter judgments of acquittal in jury trials." *Id.* at 41 n.1. Nonetheless, the Court concluded that retrial was barred where the trial court's ruling and the opinion of the Louisiana Supreme Court both made clear that the ruling was based on the judge's determination that the prosecution's evidence was legally insufficient. *Id.* at 44. The application of the Double Jeopardy Clause thus turned entirely on the substance of the fact finder's decision, and not the state-law form it assumed.[7]

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[7] While a number of the cases presenting this issue have arisen in the context of judicial resolution of the de-

Nor can the state's refusal to formally memorialize the jury's verdict of acquittal prevent the Double Jeopardy Clause from barring retrial on those same offenses. To do so would be to open the door to one of the precise historical evils at which the protections of the Double Jeopardy Clause were aimed. In the case of *The Queen* v. *Charlesworth*, (1861) 121 Eng. Rep. 786, 801 (Q.B.), the court rehearsed the history of the "tyrannical practice"—committed most famously in the treason cases of Whitebread and Fenwick, *Ireland's Case*, 7 How. St. Tr. 79 (1678); *Whitebread's Case*, 7 How. St. Tr. 311 (1679)—of discharging a jury in the face of an impending acquittal in order to provide the prosecution with an opportunity to gather additional evidence and retry the defendant. As the Court explained, "[T]he prohibition against double jeopardy as it evolved in this country was plainly intended to condemn this 'abhorrent' practice" of "discharg[ing] a jury whenever it appeared that the Crown's evidence would be insufficient to convict." *Arizona* v. *Washington*, 434 U.S. at 507-508. See also David S. Rudstein, Double Jeopardy: A Reference Guide to the United States Constitution, 10 (2004). For that reason, "it has long been settled under the Fifth Amendment that a verdict of acquittal is final * * * and even when 'not followed by any judgment, is

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fendant's guilt, the Court "ha[s] long held that the Double Jeopardy Clause of the Fifth Amendment prohibits reexamination of a court-decreed acquittal to the same extent it prohibits reexamination of an acquittal by jury verdict." *Smith*, 543 U.S. at 467; see also *Tibbs* v. *Florida*, 457 U.S. 31, 41 (1982) ("A verdict of not guilty, whether rendered by the jury or directed by the trial judge, absolutely shields the defendant from retrial.").

a bar to a subsequent prosecution for the same offence.'" *Green*, 355 U.S. at 188 (quoting *United States* v. *Ball*, 163 U.S. at 671).

The Double Jeopardy Clause does not permit the State of Arkansas to avoid the Fifth Amendment consequences of the jury's announcement of its verdict as to the charges of capital and first-degree murder. The state's refusal, as a matter of state law, to accept that verdict does not alter the constitutional status of that verdict. The question for Double Jeopardy purposes is whether the jury "actually * * * resol[ved] * * * some or all of the factual elements of the offense charged." *Martin Linen*, 430 U.S. at 571. The jury here plainly resolved the question of the murder offenses. The jury's determination must be given final effect, and Arkansas may not again put Blueford through the "expense and ordeal," *Benton*, 395 U.S. at 795-796 (citation and internal quotation marks omitted), of defending himself against the charges of capital and first-degree murder that have already been resolved—in his favor—by a jury of his peers.

II. The Acquittal-First Instructions Establish that the Jury Acquitted Blueford of Murder.

A second prosecution of Blueford on capital and first-degree murder charges also would violate his Double Jeopardy rights because, under the acquittal-first instructions, the jury acquitted him of those charges.

The trial court instructed the jury to consider the offenses one at a time, beginning with the greatest offense and proceeding to a lesser offense only if it acquitted the defendant on the greater offense. App. 51-52. The state repeatedly emphasized this instruc-

tion to the jury in its closing arguments. See, *e.g.*, *id.* at 59 ("[U]nless all 12 of you agree that this man's actions were not consistent with capital murder, then and only then would you go down to murder in the first degree."). Accordingly, if the jury followed its instructions, it could not reach the manslaughter charge unless and until it had unanimously agreed on acquittal of the greater charges (*i.e.*, capital murder and first-degree murder).

In considering the Double Jeopardy implications of this instruction, it is helpful to distinguish between different types of instructions. The trial court's instruction reflects an "acquittal-first" or "hard-transition" instruction, in which the jury must acquit on a greater offense before it moves to a lesser offense. In contrast, some jurisdictions use a "soft-transition" instruction, in which the jury is allowed to consider the offenses in any order it chooses. In an opinion reviewing both types of instructions, Judge Henry Friendly explained that both types of instructions have possible advantages and disadvantages for the government and defendants. *United States* v. *Tsanas*, 572 F.2d 340, 345-346 (2d Cir. 1978). Judge Friendly concluded that "[n]either form of instruction is wrong as a matter of law," *id.* at 346, and determined that, as a matter of federal practice, the defendant's choice of instruction should be honored if the defendant makes such an election, *ibid.*

In this case, consistent with Arkansas law, the court gave the jury the acquittal-first instruction. It is, of course, well-settled that juries are presumed to follow instructions. See, *e.g.*, *Weeks* v. *Angelone*, 528 U.S. 225, 234 (2000). Indeed, the presumption is especially strong where, as in this case, the jury has

received "clear and unambiguous instructions." *Abney* v. *United States*, 431 U.S. at 665. Thus, the jury in Blueford's case must be presumed to have followed the court's instruction that it could reach the first-degree murder count only if it had determined unanimously that it had "a reasonable doubt" about his guilt on capital murder. Likewise, the jury must be presumed to have followed the court's instruction that it could reach the manslaughter count only if it had determined unanimously that it had a "reasonable doubt" about his guilt on first-degree murder. When the jury reported that it was deadlocked on manslaughter, it necessarily was reporting that it had acquitted on the murder charges: the acquittal-first instructions dictated that sequence.

Here, moreover, Blueford's acquittal by the acquittal-first instructions is established not only by the settled presumption that juries follow instructions (which would itself be sufficient). In this case, the record also reflects explicit confirmation that the jury understood and followed the acquittal-first sequence. The forewoman explained that the jury had not considered the lesser-included offense of negligent homicide because it was deadlocked on the greater offense of manslaughter. See App. 65 ("We did not vote on [negligent homicide] * * * We couldn't get past the manslaughter. Were we supposed to go past that? I thought we were supposed to go one at a time."). The jury forewoman thus confirmed that the jury carefully followed the acquittal-first instructions, moving to lesser offenses only after it had acquitted on greater offenses. See *Weeks*, 528 U.S. at 234 (observing under the facts of the case that "the presumption [that the jury follows instructions]

gain[ed] additional support from several empirical factors").

Accordingly, the jury's announcement that it was deadlocked on the manslaughter charge necessarily establishes that it acquitted Blueford of the murder charges (even if the forewoman had not stated expressly that the jury was "unanimous against" the murder charges). Under this Court's precedents, these acquittals are entitled to full Double Jeopardy protection. The Court previously has looked to a jury's compliance with jury instructions to give meaning to a potentially ambiguous verdict, see *Abney*, 431 U.S. at 664-665, and it likewise has recognized "implicit" acquittals on greater offenses as a necessary implication of a jury's resolution of a lesser-included offense, see, *e.g.*, *Green* v. *United States*, 355 U.S. at 190; *Price* v. *Georgia*, 398 U.S. at 329.[8]

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[8] Before the decision below, state high court decisions in both acquittal-first and soft-transition jurisdictions had carefully distinguished between the possible Double Jeopardy consequences of jury deadlocks under acquittal-first and soft-transition instructions. See *State* v. *Tate*, 773 A.2d 308, 323 (Conn. 2001) (in acquittal-first context, Double Jeopardy bars retrial of greater offenses after deadlock on lesser offenses; "[i]n jurisdictions with an acquittal first requirement, * * * jeopardy attaches to those greater offenses upon which the jury has unanimously agreed to acquit, even if the jury is unable to reach a final verdict as to any of the lesser included offenses") (internal quotation marks, citations, and brackets omitted); *People* v. *Richardson*, 184 P.3d 755, 764 n.7 (Colo. 2008) (in soft-transition context, Double Jeopardy does not bar retrial of greater offenses after deadlock on lesser offense; the Double Jeopardy rule advocated by defendant "has developed

The same principles that bar retrial of the murder charges after the jury's explicit statement of acquittal bar retrial of the murder charges after the acquittal-first instruction and deadlock on the lesser-included offense. The lack of a formal verdict form does not vitiate the acquittal: this Court long ago announced that "a verdict of acquittal, although not followed by any judgment, is a bar to a subsequent prosecution for the same offence," *United States* v. *Ball*, 163 U.S. at 671, and it has expressly rejected the requirement of a "verdict of acquittal formally returned by the jury" for an acquittal rendered in another form to be afforded protection under the Double Jeopardy Clause, *Martin Linen*, 430 U.S. at 572. Rather, the pertinent question is "whether the ruling * * *, whatever its label, actually represents a resolution, correct or not, of some or all of the factual elements of the offense charged." *Id.* at 571. Here, the jury's deadlock on manslaughter—when considered in light of the acquittal-first jury instructions—conclusively demonstrates that the jury had reached "a resolution" on "some * * * of the factual elements" of the offense charged.

Double Jeopardy principles, furthermore, bar retrial on the murder charges because the use of acquittal-first instructions establishes that there was no "manifest necessity" to discharge the jury and retry Blueford on murder charges. The protections of the Double Jeopardy Clause attached at his first trial when the jury was empanelled. See *Crist*, 437 U.S.

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almost exclusively in 'hard transition' states. * * * We therefore find the cases * * * distinguishable on that basis.").

at 35; *Downum* v. *United States*, 372 U.S. 734, 737-738 (1963). At that point, Blueford could be retried on the charges at issue after a mistrial only if the state could demonstrate "a manifest necessity for the act, or [that] the ends of public justice would otherwise be defeated." *United States* v. *Perez*, 9 Wheat. at 580.

The "manifest necessity" requirement prevents courts from ordering a mistrial and thereby subjecting a defendant to the ordeal of retrial unless there is a compelling reason to do so. See *Arizona* v. *Washington*, 434 U.S. at 505 ("[T]he prosecutor must shoulder the burden of justifying the mistrial if he is to avoid the double jeopardy bar. His burden is a heavy one. The prosecutor must demonstrate 'manifest necessity' for any mistrial declared over the objection of the defendant."). "The policy of avoiding multiple trials has been regarded as so important that exceptions to the principle have been only grudgingly allowed." *United States* v. *Wilson*, 420 U.S. at 343; see also *id.* at 344 n.12 ("In *Perez*, the Court emphasized the limited scope of this exception."); *Renico* v. *Lett*, 130 S. Ct. 1855, 1862-1863 (2010) (noting that retrial is permitted only where there is a "'high degree' of necessity" for a mistrial (quoting *Arizona* v. *Washington*, 434 U.S. at 506) (some internal quotation marks omitted)).

Traditionally, a jury's inability to reach a verdict offers "the classic basis for a proper mistrial." *Arizona* v. *Washington*, 434 U.S at 509. That rule "accords recognition to society's interest in giving the prosecution one complete opportunity to convict those who have violated its laws." *Ibid.*

But here, there was no "manifest necessity" for the judge to declare a mistrial with respect to the charges of capital and first-degree murder: the acquittal-first instructions establish that the jury reached a verdict on those charges. Thus, refusal to accept the jury's votes to acquit on the murder charges does not establish the "manifest necessity" that would permit a second trial on the murder charges.

In light of the acquittal-first instructions (which the jury carefully followed) and the lack of manifest necessity for a retrial on the murder charges, the Court should reverse the judgment of the Arkansas Supreme Court.

III. No Murder Retrial Is Permitted Because the First Jury Had a Full Opportunity to Return a Verdict on Those Charges.

In addition to the jury forewoman's explicit statements and the necessary implications of the jury's deadlock on a lesser-included offense following an acquittal-first instruction, the state cannot retry Blueford on the murder charges because the jury here "was given a full opportunity to return a verdict and no extraordinary circumstances appeared which prevented it from doing so." *Green* v. *United States*, 355 U.S. at 191; see also *Price* v. *Georgia*, 398 U.S. at 329. Because the jury deliberations in this case on the murder charges did not result in a conviction or a deadlock, Double Jeopardy principles prevent retrial of Mr. Blueford on those charges.

As in *Green* and *Price*, the jury in this case "was given a full opportunity" to convict Blueford of murder. Before the jury began deliberating, the judge

issued verdict forms that allowed the jury to return a guilty verdict on the murder charges. App. 60. Armed with those forms, the jury conducted its initial deliberations, continued deliberations after receiving an *Allen* charge, and then resumed its deliberations once again after the judge re-issued the *Allen* charge. *Id.* at 61-70. Yet the jury steadfastly refused to convict on the murder charges and offered no indication that it was deadlocked on those charges.

Had the jury convicted Blueford of manslaughter, it is well settled that the state could not retry him on the murder charges. In *Green*, the jury convicted the defendant of second-degree murder and was silent on first-degree murder. After the second-degree murder conviction was overturned on appeal, this Court held that Green could not be retried for first-degree murder because "Green was in direct peril of being convicted and punished for first degree murder at his first trial. He was forced to run the gantlet once on that charge and the jury refused to convict him." *Green* v. *United States*, 355 U.S. at 190. The Court held that it was sufficient that the first jury "was given a full opportunity to return a verdict and no extraordinary circumstances appeared which prevented it from doing so." *Id.* at 191. Therefore, "jeopardy for first degree murder came to an end when the jury was discharged so that he could not be retried for that offense." *Ibid.*

The Court unanimously reaffirmed *Green* in *Price* v. *Georgia*, 398 U.S. 323. On facts similar to those in *Green*, the Court explained that it had "consistently refused to rule that jeopardy for an offense continues after an acquittal, whether that acquittal is express or implied by a conviction on a lesser included offense

when the jury was given a full opportunity to return a verdict on the greater charge." *Id.* at 329 (footnote omitted).

The only difference between this case and *Green* and *Price* is that Blueford's jury deadlocked on the lesser-included offense rather than convicting on it. If anything, that difference makes this a stronger case for Double Jeopardy than *Green* and *Price*. It would be a bizarre rule of law to afford Green and Price, whose juries unanimously convicted them on lesser offenses, greater Double Jeopardy protection than Blueford, whose jury included jurors voting to acquit on the lesser offense. Such a rule of law also would be inconsistent with the rationale in *Green*, which made clear that its result did not depend on the jury's determination on the lesser-included offense: "Even more important, Green's plea of former jeopardy does not rest on his conviction for second degree murder but instead on the first jury's refusal to find him guilty of felony murder." 355 U.S. at 194 n.14.

Moreover, the jury's deadlock on the manslaughter charge after it did not return a guilty verdict or deadlock on either of the murder charges does not create a "manifest necessity" for a retrial on the murder charges. *Perez*, 9 Wheat. at 580; see also *Smith* v. *Massachusetts*, 543 U.S. at 469 n.3 (citing *Price* for the principle that "jeopardy may terminate on some counts even as it continues on others"). As this Court has explained, *Perez*'s narrow "manifest necessity" exception to the rule against twice subjecting a defendant to jeopardy on any given charge serves to "accord[] recognition to society's interest in giving the prosecution one complete opportunity to

convict." *Arizona* v. *Washington* 434 U.S. at 509. Here, the state had its one complete opportunity to convict Blueford of murder, and the jury neither returned a guilty verdict on the murder charges nor reported a deadlock on the murder charges. Accordingly, there is no manifest necessity for a retrial on those charges.

Because the jury was afforded a full opportunity to return a guilty verdict on the murder charges, the Double Jeopardy Clause prevents the state from taking a second bite at the apple on those charges.

* * * * *

The Arkansas Supreme Court's decision would create a rule of law that disregards a jury's unanimous vote against guilt on criminal charges—expressed in words, in prescribed sequence of deliberation, and in deadlock on a lesser-included offense—as long as the court refuses to accept that jury determination. The language, history, and purpose of the Double Jeopardy Clause establish a different legal regime. The jury's resolution of criminal charges, however expressed, must be given conclusive effect, and the prohibition against "jeopardy" for "the same offence" must be respected.

The Constitution prevents the state from forcing Alex Blueford to run the gantlet once again on capital murder and first-degree murder.

CONCLUSION

For the foregoing reasons, the judgment of the Arkansas Supreme Court should be reversed.

Respectfully submitted,

WILLIAM R. SIMPSON, JR.
SHARON KIEL
CLINT MILLER
SIXTH JUDICIAL DISTRICT (ARKANSAS) PUBLIC DEFENDERS OFFICE
201 S. Broadway, Ste. 210
Little Rock, AR 72201
(501) 340-6120

CLIFFORD M. SLOAN
Counsel of Record
GEOFFREY M. WYATT
DAVID W. FOSTER
MOSHE SPINOWITZ
SKADDEN, ARPS, SLATE, MEAGHER & FLOM LLP
1440 New York Ave., NW
Washington, DC 20005
(202) 371-7000
cliff.sloan@skadden.com

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RESPONDENT'S BRIEF

RECORD AND BRIEFS

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ALEX BLUEFORD,

Petitioner,

v.

STATE OF ARKANSAS,

Respondent.

On Writ Of Certiorari To The Supreme Court Of Arkansas

BRIEF FOR RESPONDENT

DUSTIN MCDANIEL
Arkansas Attorney General

DAVID R. RAUPP*
Senior Assistant Attorney General

EILEEN W. HARRISON
LAUREN ELIZABETH HEIL
VALERIE GLOVER FORTNER
Assistant Attorneys General

OFFICE OF THE ATTORNEY GENERAL
323 Center Street, Suite 200
Little Rock, AR 72201
(501) 682-3657
(501) 682-2083
david.raupp@arkansasag.gov

**Counsel of Record*

Of Counsel:

DAN SCHWEITZER
2030 M Street, NW
8th Floor
Washington, DC 20036
(202) 326-6000

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

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QUESTION PRESENTED

Whether, if a jury deadlocks on a lesser-included offense, the Double Jeopardy Clause bars reprosecution of a greater offense after a jury announces that it has voted against guilt on the greater offense.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
TABLE OF CONTENTS	ii
TABLE OF AUTHORITIES	iii
OPINION BELOW	1
JURISDICTION	1
CONSTITUTIONAL PROVISIONS INVOLVED	1
STATEMENT OF THE CASE	1
SUMMARY OF ARGUMENT	8
ARGUMENT	13
I. A Mistrial Due To A Deadlocked Jury Does Not Terminate Jeopardy, But Instead Permits Retrial	14
II. Petitioner's Jury Did Not Expressly Acquit Him Of Murder	16
A. The Foreperson's Mid-deliberation Report Was Not An Acquittal Or Final	18
B. The Jury's Instructions Did Not Convert The Foreperson's Mid-deliberation Report Into An Acquittal	21
III. Petitioner's Jury Did Not Impliedly Acquit Him.	29
IV. Any Challenge To The Court's Declaration Of A Mistrial Is Waived And Is Without Merit	33
CONCLUSION	41

TABLE OF AUTHORITIES

Page

CASES

Allen v. United States, 164 U.S. 492 (1896).....6

Arizona v. Washington, 434 U.S. 497 (1978).....8, 13, 15, 37

Boyd v. State, 369 Ark. 259, 253 S.W.2d 456 (2007).....25

Brown v. Ohio, 432 U.S. 161 (1977).....31

Burks v. United States, 437 U.S. 1 (1978) 17

Commonwealth v. Roth, 776 N.E.2d 437 (Mass. 2002).....36, 40

Donaldson v. United States, 856 A.2d 1068 (D.C. 2004).....27

Green v. State, 80 P.3d 93 (Nev. 2003) 26

Green v. United States, 355 U.S. 184 (1957).....*passim*

Illinois v. Somerville, 410 U.S. 458 (1973) 38

Kunselman v. State, 501 S.E.2d 834 (Ga. App. Ct. 1998).....27

Lindsey v. State, 456 So.2d 383 (Ala. Cr. App. 1983).....24

Mathews v. United States, 485 U.S. 58 (1988).....34

Oregon v. Kennedy, 456 U.S. 667 (1982).....33

People v. Boettcher, 505 N.E.2d 594, 513 N.Y.S.2d 83 (1987).....22

People v. Handley, 329 N.W.2d 710 (Mich. 1982) 27

TABLE OF AUTHORITIES – Continued

Page

People v. Richardson, 184 P.3d 755 (Colo. 2008) 36

People v. West, 291 N.W.2d 48 (Mich. 1980) 27

Pharr v. Israel, 629 F.2d 1278 (7th Cir. 1980) 24

Price v. Georgia, 398 U.S. 323 (1970) .....*passim*

Renico v. Lett, 130 S. Ct. 1855 (2010) 12, 37, 38

Richardson v. United States, 468 U.S. 317 (1984) 14, 15, 21, 30

Schmuck v. United States, 489 U.S. 705 (1989) 22

Smith v. Massachusetts, 543 U.S. 462 (2005) 17

State v. Cummings, 744 P.2d 858 (Kan. 1987) 26

State v. Daniels, 156 P.3d 905 (Wash. 2007) 27

State v. Daulton, 518 N.W.2d 719 (N.D. 1994) 24

State v. Davis, 266 S.W.3d 896 (Tenn. 2008) 23

State v. Klafta, 831 P.2d 512 (Hawaii 1992) 26

State v. Labanowski, 816 P.2d 26 (1991) 23

State v. Raudebaugh, 864 P.2d 596 (Idaho 1993) 24

State v. Sawyer, 630 A.2d 1064 (Conn. 1993) 24

State v. Shumway, 63 P.3d 94 (Utah 2002) 27

State v. Thomas, 533 N.E.2d 286 (Ohio 1988) 26

State v. Truax, 444 N.W.2d 432 (Wis. App. Ct. 1989) 26

State v. Van Dyken, 791 P.2d 1350 (Mont. 1990) 24

TABLE OF AUTHORITIES – Continued

Page

Stewart v. State, 316 Ark. 153, 870 S.W.2d 752 (1994) 39

Tisius v. State, 183 S.W.3d 207 (Mo. 2006) 27

United States v. Birdsong, 982 F.2d 481 (11th Cir. 1993) 36

United States v. Buishas, 791 F.2d 1310 (7th Cir. 1986) 35

United States v. Martin Linen Supply Co., 430 U.S. 564 (1977) 9, 17, 20

United States v. Perez, 9 Wheat. 579 (1824) 14, 15

United States v. Scott, 437 U.S. 82 (1978) 16

United States v. Spock, 416 F.2d 165 (1st Cir. 1969) 35

United States v. Tsanas, 572 F.2d 340 (2d Cir. 1978) 23, 24

Wade v. Hunter, 336 U.S. 684 (1949) 14, 15, 38

Whiteaker v. State, 808 P.2d 270 (Alaska App. 1991) 36

Yeager v. United States, 129 S. Ct. 2360 (2010) 11, 17, 20, 31

Young v. Johnson, 311 Ark. 551, 845 S.W.2d 510 (1993) 39

STATUTES

Ark. Code Ann. § 5-10-101(9)(A) (Repl. 2006) 1

TABLE OF AUTHORITIES – Continued

Page

RULES

Ark. R. Crim. Pro. 33.7 (2011).....40

Fed. R. Civ. P. 49(b)(4) & (b)(5) (2011) 36

OTHER AUTHORITIES

Arkansas Model Criminal Instruction 2d 8102.....6

3 Charles Alan Wright & Sarah N. Welling, FEDERAL PRACTICE AND PROCEDURE: FEDERAL RULES OF CRIMINAL PROCEDURE (4th ed. 2011) 35

G. Clementson, SPECIAL VERDICTS AND SPECIAL FINDINGS BY JURIES (1905).....35

H. Kalven & H. Zeisel, THE AMERICAN JURY (1966).....13, 19

Richard E. Myers II, *Requiring A Jury Vote of Censure to Convict*, 88 N.C. L. Rev. 137 (2009).....35

OPINION BELOW

The judgment of the Arkansas Supreme Court was delivered on January 20, 2011, and is published as *Blueford v. State*, 2011 Ark. 8, ___ S.W.3d ___.

JURISDICTION

The Court has jurisdiction pursuant to 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution prohibits placing persons in jeopardy of life or limb twice for the same offense. The Due Process Clause of the Fourteenth Amendment makes it applicable to the States.

STATEMENT OF THE CASE

1. Petitioner was charged with knowingly causing the death of Matthew McFadden, the 19-month-old child of Petitioner's live-in girlfriend Kimberly Tolbert, under circumstances that manifested an extreme indifference to the value of human life in violation of Ark. Code Ann. § 5-10-101(9)(A) (Repl. 2006), a section of Arkansas' capital-murder statute. J.A. 45a-46a.

At his jury trial, the evidence presented by the State established that, on the morning of November 28, 2007, Tolbert left baby Matthew with Petitioner while she took a relative to a doctor's appointment. Arkansas Supreme Court Record ("ASCR") 123-24. Petitioner admits that he took a cell-phone call and began smoking marijuana shortly after Tolbert left. ASCR 647-48. Within an hour of being in Petitioner's "care," Matthew, who woke that morning healthy and playful, had sustained a closed-head injury so severe that he arrived at Arkansas Children's Hospital in cardiac and respiratory arrest due to a massive brain bleed that led to a coma and eventually his death three days later. ASCR 124, 132, 135, 201-09.

At the hospital, Petitioner denied any firsthand knowledge of what happened to Matthew, instead reporting to both the family and the initial investigating officers that minutes after leaving Matthew playfully jumping around his bedroom, he had found the baby unconscious and not breathing. ASCR 129, 182-83, 425-27. Despite the gravity of Matthew's injuries and the fact that he was not only dating but also living with his mother, Petitioner left the hospital and never returned to check on Matthew and did not attend his funeral. ASCR 133-35. Petitioner did not even speak to Tolbert when she returned to their apartment to collect her things. ASCR 134. When a warrant was issued, Petitioner attempted to evade arrest by fleeing to Texas, where he was apprehended following a routine traffic stop. ASCR 432-33, 671-72.

In the course of the investigation, Petitioner gave several statements to police in which he repeatedly denied any responsibility for Matthew's injuries, including a recorded statement given to an investigator in Texas accusing Tolbert of killing her son Matthew. ASCR 430-31, 443-45, 523, 528, 678-79. At trial, Petitioner admitted he lied, including implicating the baby's mother, in order to escape blame. ASCR 655-56, 678-79, 692-93. The version of events Petitioner asked the jury to believe at trial was that Matthew was injured accidentally when, startled by the boy, Petitioner elbowed him in the head knocking him into a table. ASCR 649-50. Rather than immediately seeking medical attention for Matthew, Petitioner testified that he told Matthew "my bad," laid him down on the bed, and left the room to talk to his other roommate only to find Matthew unresponsive sometime later. ASCR 651.

At trial, Petitioner argued that the severity of Matthew's condition was caused not by the initial injury, but, rather, by the emergency medical team's intubation of Matthew en route to the hospital. The State's experts, including Matthew's treating physicians, Drs. Rhonda Dick and Michele Moss, the State medical examiner, Dr. Adam Craig, as well as Dr. Karen Farst, Arkansas Children's Hospital's pediatric physician charged with reporting suspicious injuries to police, all disagreed.

Dr. Dick, who is board certified in pediatric emergency care, estimated that in 28 years of working for Arkansas Children's Hospital, she had treated

between 35,000-45,000 children. ASCR 197-99. Dr. Dick testified that in all her years of experience she had never seen such a large amount of blood accumulating behind a child's eyes and opined that such an injury could only result from trauma and not, as Petitioner alleged, from a faulty attempt at intubation. ASCR 211-12, 244. Dr. Moss, who had 24 years' experience treating children in intensive-care units, testified that based on the nature and extent of the damage, it was her opinion that Matthew had sustained severe head trauma stemming from a violent event comparable to a high-speed car accident or intentional trauma. ASCR 252-56, 272. Dr. Farst similarly testified that Matthew's injuries were most consistent with the intentional infliction of a severe head injury. ASCR 568-69. Independent of the conclusions of Matthew's treating physicians, Dr. Craig, who performed the autopsy, testified that Matthew died as a result of a closed head injury and that the severity of the injury led him to conclude that the manner of death was homicide. ASCR 321-22.

Petitioner's experts expounded on studies to the effect that severe head injuries such as that suffered by Matthew could result from minor accidents where a child falls just a few feet and strikes his head on a hard surface. ASCR 482, 728. While not ruling out the State's experts' conclusions, one of Petitioner's experts, Dr. John Galaznik, testified that it was just as likely for Matthew to have sustained his injuries by accidentally being elbowed and knocked into a table, as Petitioner described. ASCR 734-36.

2. The parties agreed to the jury instructions on the lesser-included offenses of first-degree murder, manslaughter, and negligent homicide, and also agreed to the verdict forms instructing the jury to find petitioner guilty of one of the homicide offenses or not guilty of any homicide offense. J.A. 48a-50a. The jury was instructed to consider the charged offense and its lesser-included offenses as follows: "If you have a reasonable doubt of the guilt of the defendant on the greater offense, you may find him guilty only of the lesser offense. If you have a reasonable doubt as to the defendant's guilt of all offenses, you must find him not guilty." J.A. 51a. The instructions continued, "If you have a reasonable doubt of the defendant's guilt on the [greater offense], you will consider the charge of [the next lesser included offense]" J.A. 51a-52a.

The State argued in closing that the jury could not consider the lesser-included offenses until it had found Petitioner not guilty of the greater offense, and emphasized that all 12 must agree on the greater offense before consideration was given to its lesser-included offenses. J.A. 54a-55a. Petitioner's attorney argued in closing that the jurors must consider the greater offenses first but that it was free to consider the intent necessary to establish the lesser offenses to determine guilt on the greater offense and said that it was important for the jurors to read and discuss all of the jury instructions during deliberations. J.A. 57a-58a. She concluded, asking the jury to find Petitioner guilty of negligent homicide. J.A. 58a, ASCR 839.

After deliberating for three hours, the jury sent out a note asking "what happens if we cannot agree on a charge at all?" J.A. 62a. The trial court gave the jury a dynamite instruction[1] and ordered it to return to deliberations and "make every sincere effort to reach a proper verdict." J.A. 62a-63a. Roughly an hour later, the jury sent out a second note, this time stating that "[t]he jury cannot agree on any one charge in this case." J.A. 64a. This prompted inquiry by the trial court of the foreperson, during which the foreperson reported that the jury had voted "unanimous against" capital murder and first-degree murder but had voted 9-3 on manslaughter. J.A. 64a-65a. When asked if the jury had voted on negligent homicide, the foreperson explained that that instruction had not yet been considered. J.A. 65a. ("We did not vote on that, sir . . . We couldn't get past the manslaughter. Were we supposed to go past that? I thought we were supposed to go one at a time.").

Upon Petitioner's request, and apparently in the belief the jury "would at least take a vote on negligent homicide[,]" the trial court gave the jury a second dynamite charge and told it to return to deliberations. J.A. 66a-67a. At this point, Petitioner's counsel asked that the jury be given the option of returning verdicts on the two greater offenses. J.A. 67a-68a. In response, the trial court suggested that such a

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[1] The judge read to the jury Arkansas Model Criminal Instruction 2d 8102 based on *Allen v. United States*, 164 U.S. 492 (1896).

request was equivalent to changing horses in mid-stream, noting that the jury had already been instructed and been given verdict forms that required either a finding of guilt as to capital murder or one of its lesser-included offenses or a finding of not guilty as to all homicide offenses. J.A. 68a. After the jury again reported that it was hopelessly deadlocked, the trial court declared a mistrial, based on what it called confusion about instructions and because the jury had deliberated over five hours "without being able to reach a verdict." J.A. 69a-70a.

3. After learning through a response to his motion for a bill of particulars that the State intended to retry him on capital murder, Petitioner moved to have his case dismissed on double jeopardy grounds. The trial court denied Petitioner's motion, finding that the jury had not rendered any findings or verdicts, had not completed its deliberations, and had not acquitted Petitioner of any charge. Pet. App. 15a-16a. Petitioner then filed an interlocutory appeal with the Arkansas Supreme Court, which upheld the trial court's findings that jeopardy did not terminate when the jury reported its state of deliberations; therefore, Petitioner could be retried for capital murder. Pet. App. 1a-14a.

Observing that it is "axiomatic that a judgment is not valid until entered of record," the Court emphasized that the formalities surrounding the announcement of a final verdict are not trivial and, instead, insure that it is, in fact, final. Pet. App. 9a-12a. Applying this premise to the facts, the Court found

that the foreperson was simply engaging in a discussion with the trial court that the jury could not reach a verdict and not, as Petitioner argued, announcing a formal verdict of acquittal. Pet. App. 10a-11a. The Court then upheld the trial court's rejection of Petitioner's request for partial verdicts, adopting the majority view that they are not compelled by the Double Jeopardy Clause. Pet. App. 12a-13a. After Petitioner's request for rehearing was denied, Pet. App. 17a, Petitioner filed a Petition for a Writ of Certiorari, which was granted.

SUMMARY OF ARGUMENT

1. Petitioner's deadlocked jury was the classic example of manifest necessity warranting a mistrial, *see Arizona v. Washington*, 434 U.S. 497, 509 (1978), and the Double Jeopardy Clause, therefore, permits the State to retry him for capital murder and its lesser-included offenses. This is so despite the foreperson's mid-deliberation colloquy with the trial court regarding the jury's deliberations to that point on capital murder and first-degree murder. Contrary to the arguments of Petitioner and his amici, the foreperson's report that the jury had voted unanimously against those offenses does not amount to a verdict of acquittal.

2. As the most common and straightforward form of acquittal, a jury's verdict that a defendant is not guilty of the charged offense is the paradigm for

judicial acquittal events, which this Court has defined as clear, final "resolution[s], correct or not, of some or all of the factual elements of the offense[s] charged." *United States v. Martin Linen Supply Co.*, 430 U.S. 564, 571 (1977). A jury verdict bears these hallmarks; it is a resolution; it represents juror agreement at the end of deliberations; it is unmistakably clear when it is issued; and it ordinarily cannot be reconsidered once it is accepted.

The foreperson's mid-deliberation report of the jury's votes on murder does not have any of these acquittal hallmarks. There is no confirmation in the record that the report accurately reflected each juror's vote or the reasons for it. The report came in the middle of the jury's deliberations; a point after which juries frequently change their collective minds, particularly, as here, after a dynamite instruction. Unlike a verdict at the end of deliberations, the foreperson's mid-deliberation report did not constitute a "resolution" with unmistakable clarity, but represented only a tentative decision.

The jury's transitional instructions, moreover, were not "acquittal first" instructions that converted the foreperson's report into an event of greater consequence. Unlike actual "acquittal first" instructions, the instructions used in Petitioner's case did not require the jury to issue a verdict or to acquit before considering a lesser-included offense. Secondly, while using a step-down procedure, the instructions in Petitioner's case did not foreclose the jury's ability to step back up and reconsider its prior votes on greater

offenses. Indeed, there is no basis to believe that the jury ultimately did not revisit its earlier votes on murder. Arkansas's transitional instructions do not establish that the foreperson's mid-deliberation vote report represented a verdict of acquittal any more than the report itself does.

3. Similarly, the transitional instructions do not establish that the jury impliedly acquitted Petitioner. Petitioner's "implied acquittal" theory rests on the faulty premise that the jury deadlocked on manslaughter after completing its deliberations on capital murder and first-degree murder. At bottom, therefore, Petitioner's implied acquittal argument is no different from his argument that the transitional instructions converted the foreperson's interim report on murder into an acquittal, and it fails for the same reasons. Nothing in the transitional instructions, the prosecutor's closing argument, the foreperson's report, or the notes passed by the jury indicate that it could not – or in fact did not – reconsider the murder offenses during its final half hour of deliberations. The jury's report of a deadlock immediately prior to the declaration of a mistrial, in fact, did not indicate the offenses on which the jury was hung or whether the jury had reached a unanimous resolution on any of the offenses.

Even if Petitioner's jury had been deadlocked on the lesser offense of manslaughter at the end of its deliberations, it would not have amounted to an implied acquittal of capital murder and first-degree murder under *Green v. United States*, 355 U.S. 184

(1957), and *Price v. Georgia*, 398 U.S. 323 (1970). *Convictions* on lesser-included offenses, which raised the "legitimate assumption" that those juries acquitted the defendants of the greater offenses, were indispensable components of both *Green* and *Price*. *Green*, 355 U.S. at 190-91; *see also Price*, 398 U.S. at 328. A jury that deadlocks, on the other hand, does not decide anything. *Yeager v. United States*, 129 S. Ct. 2360, 2370 (2009). Therefore, a jury's report of a deadlock on a lesser-included offense cannot, as a conviction can, imply an acquittal on the greater offense.

Additionally, *Green* and *Price* do not support Petitioner's argument that jeopardy nonetheless terminated on capital murder and first-degree murder because his jury, like the juries in those cases, had a full opportunity to return a verdict and no extraordinary circumstances prevented it from doing so. A jury deadlock, of course, is an "extraordinary circumstance" that justifies a declaration of a mistrial and a retrial on the charged offense. Unlike the juries in *Green* and *Price*, the deadlock of Petitioner's jury prevented a verdict on the lesser-included offenses.

4. Finally, Petitioner's challenge to the trial court's declaration of a mistrial is waived and without merit. Petitioner cannot now complain that there was no manifest necessity warranting a mistrial on the murder offenses because, although he did not request a mistrial, he failed to object when the trial judge explained that he was going to declare a mistrial *sua sponte* if the jury failed to reach a decision. J.A. 68a-69a. Petitioner's contention that the trial judge

lacked the authority to order a mistrial of the entire case, including the murder offenses, also fails on its merits. Petitioner is essentially arguing that the Constitution mandates partial verdicts, and, thereby, urges a striking and unjustified departure from the longstanding practice of requiring only general verdicts in criminal cases.

A partial verdict in the context of greater and lesser-included offenses equates to a "special verdict," which has long been disfavored in criminal law because it can, among other things, hinder deliberations by guiding the jury to a conclusion. More generally, requiring a jury to return a partial verdict following a deadlock without allowing deliberations to fully conclude is more likely to yield a verdict that was made in the spirit of compromise, and not a just adjudication of the charged offense.

By asserting that the Double Jeopardy Clause compels partial verdicts, Petitioner and his amici urge the very kind of rigid, mechanical rule this Court has previously refused to apply to a trial judge's exercise of discretion in discharging juries, particularly those that are deadlocked. *See Renico v. Lett*, 130 S. Ct. 1855, 1863 (2010). The Court should reject the rule that Petitioner and his amici apparently propose: that a trial judge's discharge of a jury deadlocked on a single charged offense and its lesser-included offenses always requires partial verdicts to determine which offenses may be retried. The circumstances of Petitioner's case, moreover, confirm that the trial judge

did not abuse his discretion by declaring a mistrial on the entire case.

ARGUMENT

Juror deadlock resulting in the declaration of a mistrial is a clear, if unsatisfying, possibility in the criminal justice system. While a hung jury suggests failure, "it is a valued assurance of integrity" by its protection of minority dissent. H. Kalven & H. Zeisel, THE AMERICAN JURY 453 (1966). Long ago courts abandoned practices to coerce verdicts from juries that could not unanimously agree, recognizing that coerced verdicts came at the expense of justice by intruding into the deliberative process. As the Court has observed, it is an old idea that a verdict should be the product of the conviction of the minds of the jurors, not of their "suffering of mind or body." *Arizona v. Washington*, 434 U.S. 497, 510 n.27 (1978) (citation and internal quotation marks omitted). Whether jurors can reach a just verdict or a mistrial must be declared due to deadlock is left to the discretion of the trial court, subject to review only for abuse, *id.* at 509-10, and calls for no scrutiny of the jury's deliberations.

Thus, for nearly two centuries, the Court has said the Double Jeopardy Clause permits new trials following such mistrials, recognizing that retrial in that circumstance does not force a defendant to run the gantlet twice for the same offense. That defense

right is "subordinated to the public's interest in fair trials designed to end in just judgments." *Richardson v. United States*, 468 U.S. 317, 325 (1984) (quoting *Wade v. Hunter*, 336 U.S. 684, 689 (1949)).

As explained in § I below, the Double Jeopardy Clause permits Petitioner's retrial for murder because the mistrial of his capital-murder case due to juror deadlock did not terminate jeopardy on that, or any lesser-included, offense. Petitioner's arguments for avoiding retrial for murder – all of which rely on the foreperson's mid-deliberation report on the status of those deliberations – cannot withstand scrutiny. As demonstrated in §§ II and III, Petitioner's jury neither expressly nor impliedly acquitted him of the murder offenses by virtue of its mid-deliberation report or the nature of its instructions on those offenses. Finally, as shown in § IV, any dispute with the court's declaration of a mistrial as to capital murder and the lesser-included offense of first-degree murder is waived and, in any event, without merit.

I. A Mistrial Due To A Deadlocked Jury Does Not Terminate Jeopardy, But Instead Permits Retrial.

For nearly 200 years, this Court has recognized that instances of juror deadlock are the prototypical examples of the manifest necessity that warrant a mistrial and permit retrial. *United States v. Perez*, 9 Wheat. 579 (1824). Such mistrials – due to deadlock or other manifest necessity – are compelled by "the

public's interest in fair trials designed to end in just judgments." *Wade*, 336 U.S. at 689-90 (1949) (quoting and discussing *Perez*). As the Court explained in *Arizona v. Washington*, if a trial court does not discharge a jury unable to reach a verdict after "protracted and exhausting deliberations, there exists a significant risk that a verdict may result from pressures inherent in the situation rather than the considered judgment of all the jurors." *Id.*, 434 U.S. at 509.

For those reasons, this Court has held that a defendant's jeopardy does not terminate due to deadlock, thereby giving "the prosecution one complete opportunity to convict" lawbreakers. *Richardson*, 468 U.S. at 324-25 (internal quotation marks and citation omitted). Invoking Justice Holmes' aphorism that a page of history is worth a volume of logic, the Court restated the simple rule that applies here: "jeopardy does not terminate when the jury is discharged because it is unable to agree." *Id.* at 325-26.

The crucial, central fact in this case is that, after deliberating over a five-hour period, the jury never reached a verdict, prompting the trial court to declare a mistrial. J.A. 69a. Because the jury was discharged without reaching a verdict of guilty or not guilty on the charged or any lesser-included offense – it did not reach any final decision that terminated original jeopardy. Thus, the Double Jeopardy Clause does not bar any retrial on the charged offense and its lesser-included offenses.

Petitioner and his amici nevertheless argue that this general rule does not apply to him because, before the trial court declared a mistrial, the foreperson provided a mid-deliberation report that the jury was "unanimous against" capital murder and the lesser-included offense of first-degree murder and was deadlocked 9 to 3 on the still lesser-included offense of manslaughter. Petitioner and his amici offer several arguments for equating that mid-deliberation report with a verdict of acquittal as to murder, but all fail: the Double Jeopardy Clause does not elevate a mid-deliberation colloquy in a trial ending in jury deadlock into a bar to retrial.

II. Petitioner's Jury Did Not Expressly Acquit Him Of Murder.

An acquittal carries "particular significance," *United States v. Scott*, 437 U.S. 82, 91 (1978), in the administration of justice, because an acquittal can terminate jeopardy and prevent retrial. *E.g.*, *Price v. Georgia*, 398 U.S. 323, 329 (1970). The most common and straightforward type of acquittal is a jury's verdict that a defendant is not guilty of a charged offense. And because juries invariably issue their verdicts at the end of their deliberations, after telling the court they have reached a verdict, followed by a declaration in open court by a foreperson of what the verdict is (sometimes followed by a poll of the jury), this Court has had no reason to expound upon what actions by juries constitute acquittals. Indeed, a verdict – of acquittal or of guilt – speaks for itself. As the

only means by which a jury makes its determination known, *Yeager v. United States*, 129 S. Ct. 2360, 2367 (2010), a verdict is both form and substance.

On the other hand, the Court has had occasion to say what actions of *courts* amount to acquittal events that terminate jeopardy. From those cases we know that a court's action, whatever its label, is an acquittal if it "actually represents a resolution, correct or not, of some or all of the factual elements of the offense charged." *United States v. Martin Linen Supply Co.*, 430 U.S. 564, 571 (1977). That resolution must be clear – unmistakably meant to represent an acquittal. *See Burks v. United States*, 437 U.S. 1, 10, (1978). In addition, such a resolution, even if an acquittal event, will not terminate jeopardy if it may be reconsidered, *i.e.*, if it is understood at the time to be nonfinal. *See Smith v. Massachusetts*, 543 U.S. 462, 470-73 (2005).

A jury verdict of acquittal, naturally, bears similar hallmarks to judicial acquittal events – after all, it is the measure of the latter. A jury verdict of acquittal is a resolution; it represents juror agreement at the end of deliberations; it is unmistakably clear when it is issued; and it ordinarily cannot be reconsidered once accepted. By contrast, a mid-deliberation vote report – even "unanimous" against murder – does not have those hallmarks.

A. The Foreperson's Mid-deliberation Report Was Not An Acquittal Or Final.

Petitioner's first argument is that, putting to the side for now the so-called acquittal-first instructions, the foreperson's mid-deliberation report that the jury had voted 12-0 against the two murder offenses, (while voting 9-3 for conviction of manslaughter) constituted an acquittal that bars retrial of him on those two offenses. Pet'r. Br. 17-24. This is so, he argues, because "the jury ha[d] offered its clear, express, and final determination of [the] defendant's innocence on certain charges, and the jury ha[d] been discharged." *Id.* at 18. None of that is correct. The foreperson's mid-deliberation report was anything but final – deliberations continued after the colloquy, during which time the jury could have revisited its prior votes on the murder charges. Nor was there a "clear" or "express" unanimous vote against the murder charges as of the moment that counted: when the jury deliberations *concluded*, immediately after which it was discharged.

As an initial matter, the foreperson simply answered the trial court's inquiries, and there is no confirmation in the record that her report accurately reflected each juror's vote or reasons for it. In fact, the foreperson's report that the jury was unanimously against the murder charges is inconsistent with the written message sent by the jury that it "cannot agree on any one charge." J.A. 64a.

Even assuming the accuracy of the foreperson's report, Petitioner's argument fails for a more fundamental reason. His insistence that the mid-deliberation votes on the murder offenses were unchangeable, final votes for *acquittal* cannot be reconciled with the fundamental nature of jury deliberations, which is that they are fluid. Juror deliberations build consensus by "rational persuasion, sheer social pressure, and the psychological mechanism by which individual perceptions undergo change when exposed to group discussion." Kalven & Zeisel, at 489. Juries may, and often do, change their collective minds as discussions among the jurors continue, new arguments for a particular result are made, old ones are made in different ways. All the more so when, as happened here, jurors try to comply with a dynamite charge to "make every sincere effort to reach a proper verdict." J.A. 63a, 67a. And as explained in § II(B), *infra*, which responds to Petitioner's reliance on the jury instructions in this case, those instructions did not take away the jury's right to revisit its earlier votes on the murder counts.

The foreperson's mid-deliberation report that the jury had voted 12-0 against capital murder and first-degree murder was only that, a report. It is hardly mere formalism to say that no verdict of acquittal was reached here when, after returning to deliberations, the jury did not, in fact, reach a verdict of any kind. This might be a more difficult case if the jury reported at the *end of deliberations* that it had voted unanimously against guilty on the murder offenses

but was hung on the manslaughter offense. It did not do that, however, which is why Petitioner relies solely on the foreperson's statement midway through the deliberations. But the mid-deliberation report did not constitute a "resolution" with unmistakable clarity; it was only the tentative report of ongoing deliberations.

This is not a matter of mere form over substance. *See* Pet'r. Br. 18 (quoting *Martin Linen*, 430 U.S. at 571, for the proposition that "what constitutes an 'acquittal' is not to be controlled by the form of the [fact finder's] action"). The Court's analysis of what constituted an acquittal in *Martin Linen* considered "whether *the ruling of the judge*, whatever its label, actually represents a resolution, correct or not, of some or all of the factual elements of the offense charged." *Id.* (emphasis added). While the form of a *judge's* action does not dictate what constitutes an acquittal, a jury's action of acquittal comes in the form of a verdict, not tentative mid-deliberation vote reports. Juries, after all, speak only through their verdicts. *See, e.g.*, *Yeager*, 129 S. Ct. at 2367.

This is not formalistic logic; it is the axiomatic teaching of history. Here the jury could acquit Petitioner of the charged capital-murder offense and the lesser-included first-degree murder offense by reaching a verdict of guilty on the still lesser-included offenses of manslaughter or negligent homicide or by a verdict of acquittal of homicide altogether. Its mid-deliberation report was that it could not reach a verdict in any of those ways, and it was given a

dynamite charge. That report was a verdict on nothing. Ultimately, its final report was that it could not agree on a verdict, and it was discharged.

Unlike the certainty of a verdict duly returned by a jury or the unqualified or unmistakable findings of trial courts and appellate courts, Petitioner can point only to a mid-deliberation vote report by a single juror. While an appellate court's or trial court's determination of insufficiency of the evidence are non-speculative resolutions and the equivalent of a final acquittal for double-jeopardy purposes, *Richardson*, 468 U.S. at 325 & n.5, the mid-deliberation vote report of a foreperson bears little resemblance, and no equivalence, to a verdict of acquittal. The foreperson's report to the judge simply cannot bear the weight the Petitioner and his amici ask of it.

B. The Jury's Instructions Did Not Convert The Foreperson's Mid-deliberation Report Into An Acquittal.

Petitioner tries to convert the foreperson's mid-deliberation report into an event of greater consequence by characterizing Arkansas as an "acquittal first" jurisdiction and insisting that the instructions provided in this case required the jury to "acquit" Petitioner of a greater offense before it could consider a lesser offense. Pet'r. Br. at 24-30. That argument elevates jargon that does not appear in Arkansas law over the actual instructions given. The instructions to Petitioner's jury – that if "you have a reasonable

doubt of the defendant's guilt on the charge of [greater offense], you will consider the charge of [lesser offense]" – did not bar the jury from revisiting prior votes and deliberating on a greater offense even after it had considered a lesser offense. The instructions placed constraints on the jury's mode of deliberations, but they did not make the jury's initial mid-deliberation conclusions on the greater murder offenses definitive resolutions that finally terminated jeopardy as to them. Similarly, nothing the prosecutor said in closing argument prevented the jury from revisiting prior votes on greater offenses. In sum, the mid-deliberation vote reports on the murder offenses were not acquittals, were not final, and did not terminate the initial jeopardy.

1. A lesser-included offense's elements are a subset of the elements of the charged (greater) offense. *Schmuck v. United States*, 489 U.S. 705, 719 (1989). Transitional instructions are essential to guide juries through the formidable task of considering a defendant's guilt or innocence for a crime that includes lesser degrees of blameworthiness. The question is not merely guilt or innocence, but also *if guilt*, what level of culpability – the government's charge or a lesser-included offense.

Some jurisdictions fear that unless juries are required unanimously to agree on the charged offense, they will too readily render compromise verdicts in dereliction of their duty to avoid compromise by appeasing hold out jurors. *See e.g., People v. Boettcher*, 505 N.E.2d 594, 597, 513 N.Y.S.2d 83, 87 (1987).

Other jurisdictions encourage compromise verdicts and seek, instead, to avoid the coercive nature of an "acquittal-first" requirement because such a procedure could result in unnecessarily pressuring jurors to convict on a greater offense rather than cause a mistrial when a jury is deadlocked. *See, e.g., State v. Labanowski*, 816 P.2d 26, 31-36 (1991). Still other jurisdictions believe the better rule is to allow a defendant to elect between the two approaches. *See, e.g., United States v. Tsanas*, 572 F.2d 340, 345-46 (2d Cir. 1978).

Relying on Judge Friendly's opinion in *Tsanas*, 572 F.2d at 345-46, Petitioner suggests that transitional instructions fit neatly within two clearly distinguishable categories – hard transition and soft transition. They do not. There is a wider spectrum of views than a simple dichotomy among courts as how best to instruct juries to sequence to lesser-included offenses by the least intrusion into their deliberations. What matters is what the instructions directed the jury to do, not what label is fixed to those instructions.

2. In an "acquittal-first" state, strict step-down instructions and any associated verdict forms clearly and unambiguously instruct jurors that they must unanimously issue a "verdict" of not guilty, or must "acquit" the defendant of the greater offense, before considering the lesser-included offense.[2] In *Tsanas*,

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[2] *See, e.g., State v. Davis*, 266 S.W.3d 896, 901 n.2 (Tenn. 2008) (reciting pattern jury instructions in part as: If you have a

(Continued on following page)

Judge Friendly explained that "insisting on unanimity with respect to acquittal" is characteristic of a "hard-transition" instruction. 572 F.2d at 346. Arkansas's transitional instructions do not have that

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reasonable doubt as to the defendant's guilt of the charged offense, then your verdict must be not guilty as to this offense, and then you shall proceed to determine whether the defendant is guilty or not guilty of the lesser included offense); *State v. Daulton*, 518 N.W.2d 719, 722 (N.D. 1994) (holding that "instruction which requires an acquittal of the offense charged before consideration of lesser-included offenses provides for a more logical and orderly process for the guidance of the jury in its deliberations"); *State v. Raudebaugh*, 864 P.2d 596, 599 (Idaho 1993) (reciting the instruction given by the trial court as follows: "If your unanimous verdict is that [the defendant] is not guilty of murder, you must next consider the included offense of voluntary manslaughter"); *State v. Sawyer*, 630 A.2d 1064, 1071 (Conn. 1993) (holding that "the court must direct the jury to reach a unanimous decision on the issue of guilt or innocence of the charged offense before going on to consider the lesser included offenses"); *State v. Van Dyken*, 791 P.2d 1350, 1356 (Mont. 1990) (reciting the instruction as follows: "in order to reach a verdict in this case, it is necessary that you consider the crime of deliberate homicide first, and that all twelve of you find the defendant either guilty or not guilty of that charge"); *Lindsey v. State*, 456 So.2d 383, 387 (Ala. Cr. App. 1983) (holding that the trial courts' instruction that "the jury should not consider the lesser included offenses unless it found the appellant 'not guilty' of the capital offense" and that "the jury's decision should be unanimous" was a correct statement of the law); *Pharr v. Israel*, 629 F.2d 1278, 1281 (7th Cir. 1980) (quoting federal pattern jury instructions that were set forth in Devitt and Blackmar: "[i]f the jury should unanimously find the accused 'Not Guilty' of the crime charged in the indictment (information), then the jury must proceed to determine the guilt or innocence of the accused as to any lesser offense which is necessarily included in the crime charged").

characteristic and therefore are not properly considered "acquittal first."

First, the instructions used here did not require the jury to issue a verdict or to "acquit" before considering a lesser-included offense. The words "verdict" and "acquit" do not appear in the instructions, and the jury was not issued a verdict form through which it could transform its initial vote on greater offenses into a final verdict. On its face, the most that can be said of the instructions is that they required the jurors to agree that they have "a reasonable doubt of the defendant's guilt" on a greater offense before they can move on to consider a lesser offense.[3] But that characteristic does not make the instructions "acquittal first" instructions – at least if the word "acquittal" in that term of art is to retain any meaning.

Second and relatedly, not a word of the instructions took away the jury's ability to reconsider its prior votes on greater offenses. As discussed in § II(A) above, juries generally are entitled to revisit earlier votes during the course of deliberations. The instructions here did not tell the jury they could not engage in that routine jury behavior; nor has the Arkansas

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[3] Although the State has argued, as the prosecutor did here, that the word "you" in the transitional instruction is used in the plural sense, requiring unanimity before sequencing to a lesser-included offense, the Arkansas Supreme Court did not resolve the question. *Boyd v. State*, 369 Ark. 259, 264, 253 S.W.2d 456, 460 (2007). The State is assuming for the sake of argument that the jury was only to sequence unanimously.

Supreme Court ever construed the transitional instructions as depriving a jury of that power. Arkansas's instructions require juries to consider greater and lesser-included offenses in a particular order as a sequencing guide, or a step-down procedure. While the instruction may be called a ratchet to guide the jury down from a greater to a lesser-included offense, it is not a one-way ratchet. Having considered a lesser-included offense under the step-down procedure, Arkansas juries may step back up and revisit earlier votes on greater offenses.

Arkansas's transitional instruction is most similar to one of the varieties of "soft-transition" jurisdictions. "Soft-transition" jurisdictions utilize step-down instructions that include the following variations: (1) instructions that a jury is to consider the lesser-included offense after making reasonable efforts to agree on the greater offense;[4] (2) instructions that if a

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[4] *See Green v. State*, 80 P.3d 93, 97 (Nev. 2003) ("[c]ourt must instruct the jury that it may consider a lesser-included offense if, after first fully and carefully considering the primary or charged offense, it either 'finds the defendant not guilty, or' is unable to agree whether to acquit or convict on that charge"); *State v. Klafta*, 831 P.2d 512, 517 (Hawaii 1992) ("[o]nly when one or more jurors are not convinced beyond a reasonable doubt that the defendant is guilty" can you consider whether defendant is guilty of a lesser included offense); *State v. Truax*, 444 N.W.2d 432, 436 (Wis. App. Ct. 1989) (instructing the jury that "[y]ou should make every reasonable effort to agree unanimously on your verdict on the [principle charge] before considering the lesser-included offense"); *State v. Thomas*, 533 N.E.2d 286, 292-93 (Ohio 1988); *State v. Cummings*, 744 P.2d 858, 863 (Kan. 1987).

jury cannot come to a unanimous decision on either guilt or innocence, it should consider the lesser-included offense;[5] and (3) instructions that suggest, but do not require, a step-down process and allow a jury to consider lesser-included offenses without first unanimously agreeing to "acquit" on the greater offense.[6] Arkansas's instructions are close to that third

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[5] *State v. Daniels*, 156 P.3d 905, 908 (Wash. 2007) (jury instructed that it could either find the defendant guilty or not guilty of the greater offense, or if it could not reach a verdict, it could move to the lesser-included offense); *Donaldson v. United States*, 856 A.2d 1068, 1073 (D.C. 2004) (jury given the option of finding the defendant guilty or not guilty of charged offense, or if "after making all reasonable efforts to reach a verdict" and that if it could not do so, it could consider the lesser included offenses); *People v. Handley*, 329 N.W.2d 710, 712 (Mich. 1982).

[6] *State v. Shumway*, 63 P.3d 94, 96 (Utah 2002) (holding that a jury should be instructed to "consider the lesser included offenses if they do not find the defendant guilty of the charged offense," which is the proper method to avoid "any misunderstanding by jurors that they must, by unanimous vote, acquit the defendant on the charged offense before it may consider the lesser included offenses"); *Kunselman v. State*, 501 S.E.2d 834, 835 (Ga. App. Ct. 1998) (holding that the State's pattern instructions do not require a unanimous acquittal, but, rather a unanimous finding of not guilty on the charged offense leaving the jury free to consider lesser-included offenses without an "acquittal first" requirement); *People v. West*, 291 N.W.2d 48, 52 (Mich. 1980) ("There is an important difference between permitting a jury to consider lesser included offenses only if it fails to find guilt of the principal offense, and permitting it to do so only if it first acquits on the principal charge"); *Tisius v. State*, 183 S.W.3d 207, 217 (Mo. 2006) ("Missouri's instructions on lesser-included offenses do not require that the defendant first be acquitted of the greater offense" but provides that "juries are allowed to consider the lesser-included offense if they 'do not find the defendant guilty' of the greater offense").

category: they allow a jury to consider lesser offenses without requiring an initial "acquittal" on the greater offense.

3. There is no basis to believe that Petitioner's jury, during its final deliberation, did not revisit its earlier votes on the murder offenses. The foreperson's reports indicated that the jurors rightly were considering the charges in order, from greater to lesser. (Though when the trial court declared a mistrial it stated that "there seems to be a lot of confusion on the part of the – the jury about some of the instructions." J.A. 69a.) But nothing in the record indicates that the jury viewed itself as having definitively acquitted Petitioner of the murder offenses such that it could not revisit its initial vote on them. Indeed, Petitioner's counsel said in closing that, "You are free to read and talk and consider all of the charges," limited only by the requirement that it "vote first on capital murder." J.A. 57a. And although the prosecutor clarified in his closing rebuttal that the jurors must *all* agree that reasonable doubt exists as to capital murder before proceeding to first-degree murder, the prosecutor did not say that the jury could not step-back up to greater offenses. In the end, the foreperson stated only that the jury could not reach a verdict, J.A. 69a – providing no basis to believe the jury did not consider, and possibly (re)vote on *all* of the offenses during the deliberations that followed the earlier colloquy.

In sum, Arkansas's transitional instructions do not establish that the mid-deliberation vote report

from the foreperson represented a verdict of acquittal that terminated jeopardy any more than the report itself does.

III. Petitioner's Jury Did Not Impliedly Acquit Him.

Petitioner's final argument in support of treating his jury's deadlock as an acquittal is that, under *Green v. United States*, 355 U.S. 184 (1957), and *Price v. Georgia*, 398 U.S. 323 (1970), his jury impliedly acquitted him. In *Green* and *Price*, the Court held that a conviction on a lesser offense impliedly acquits a defendant of the greater offenses. Petitioner reasons that a deadlock on a lesser offense ought to have the same effect. Pet'r. Br. 32. That argument largely relies on the same faulty premises that underlie his prior two arguments; and it fails to account for the fundamental difference between a hung jury and a jury that reaches a verdict.

1. Petitioner's "implied acquittal" theory rests on the premise that the jury deadlocked on manslaughter after completing its deliberations on the murder offenses. At bottom, therefore, Petitioner's implied acquittal argument is no different from his argument that the transitional instructions converted the foreperson's interim report on capital murder and first-degree murder into an acquittal, and it fails for the same reasons set forth in § II(B), *supra*. Nothing in the transitional instructions, the prosecutor's closing argument, the foreperson's report, or the notes

passed by the jury indicate that the jury could not – or in fact did not – reconsider capital or first-degree murder after returning for its final half hour of deliberations.

The foreperson's report set forth the purported status of several offenses mid-deliberation; it was not a final resolution by the jury. That interim report did not itself constitute an "acquittal" of the murder offenses or establish that the only count the jury would consider when returned to deliberation was the manslaughter count. And the jury's report of a deadlock immediately prior to the declaration of a mistrial did not indicate the offenses on which the jury was hung or whether the jury had reached a unanimous resolution on any of the offenses. Accordingly, Petitioner is wrong to assume (Br. 32) that his "jury deadlocked on the lesser-included offense," much less that it deadlocked *only* on that offense.

2. Even if his jury had been deadlocked on the lesser offense of manslaughter at the end of deliberations, it would not have amounted to an implied acquittal of the murder offenses. An indispensable component of *Green* and *Price* was verdicts on lesser-included offenses that raised the "legitimate assumption" that those juries acquitted Green and Price of the greater offenses. *Green*, 355 U.S. at 190-91; *see also Price*, 398 U.S. at 328; *Richardson*, 468 U.S. at 325 (citing *Price* for the proposition that double jeopardy applies only if there has been some event, *such as an acquittal*, which terminates original jeopardy). A jury that convicts on a lesser-included offense

necessarily decides that the state failed to prove all of the elements of the greater offense, which explains why the conviction on the lesser-included offense, itself, is an "acquittal" of the greater offense. *See Yeager,* 129 S. Ct. at 2368-69.

It bears repeating that a charged offense and its lesser-included offenses are one charge for purposes of jeopardy calculus. *See Brown v. Ohio*, 432 U.S. 161, 168-69 (1977). For that reason, juries considering greater and lesser-included offenses need only return one, final verdict of either guilty of the charged or a lesser-included offense or not guilty – here that the petitioner was "guilty" of one of the four homicide offenses or "not guilty" of any homicide. Thus, when the *Green* and *Price* juries delivered verdicts of guilty on the lesser-included offenses, they delivered concomitant implied verdicts of acquittal on the greater offenses.

A jury that deadlocks, on the other hand, does not decide anything. *See Yeager*, 129 S. Ct. 2370 ("[T]he fact that a jury hangs is evidence of nothing – other than, of course, that it has failed to decide anything."). After all, "a jury speaks only through its verdict," *id.* at 2367, and thus "[t]o identify what a jury necessarily determined at trial," courts "scrutinize a jury's decisions, not its failures to decide." *Id.* at 2368. A jury's report of a deadlock on a lesser-included offense cannot, as a conviction can, imply an acquittal on the greater offense.

Petitioner nonetheless persists that his jury, like the juries in *Green* and *Price*, "'was given a full opportunity to return a verdict and no extraordinary circumstances appeared which prevented it from doing so.'" Pet'r Br. 30 (quoting *Green*, 355 U.S. at 191; *citing Price*, 398 U.S. at 329). A jury deadlock, of course, *is* an "extraordinary circumstance" that, as discussed in § I, *supra*, justifies a declaration of a mistrial and a retrial on the charged offense. Every jury that deadlocks can be said to have had "a full opportunity to return a verdict," thereby (under Petitioner's reasoning) barring retrial. The reason the quoted language from *Green* does not swallow the rule that defendants generally may be retried when their first jury hangs is that the juries in *Green* and *Price* did not hang. There were "no extraordinary circumstances" which "prevented" the jury from returning a verdict on the murder charges in *Green* and *Price* because the juries in those cases reached verdicts on the lesser-included offenses.

Unlike the juries in *Green* and *Price*, the deadlock of Petitioner's jury prevented a verdict on the lesser-included offenses. *Green* and *Price*, therefore, do not support finding an implied acquittal from the foreperson's mid-deliberation report that the jury was divided 9-3 on manslaughter.

IV. Any Challenge To The Court's Declaration Of A Mistrial Is Waived And Is Without Merit.

Near the end of his brief, Petitioner asserts that the trial court lacked the "manifest necessity" to declare a mistrial on the murder charges. Pet'r Br. 29-30, 32-33. His amici press that claim as well, expressly arguing that the Double Jeopardy Clause requires judges to seek partial verdicts from juries before discharging them and permitting retrial on the charged offense. Crim. Law Profs. Amicus Br. 23-28; NACDL Amicus Br. 10-20. Petitioner has waived this argument by failing to object to the trial judge's order of a mistrial; and in any event, the Double Jeopardy Clause does not mandate partial verdicts when a jury deadlocks on a charged offense and its lesser-included offenses.

1. Petitioner waived any argument that a second trial on capital murder or first-degree murder is barred because there was no manifest necessity warranting a mistrial on those charges. A defendant who fails to object to a trial judge's discharge of a deadlocked jury cannot later claim that double jeopardy bars a second trial because there was no manifest necessity warranting a mistrial. *See Oregon v. Kennedy*, 456 U.S. 667, 672 (1982) (stating that the manifest necessity test applies when a trial is terminated over a defendant's objection).

To be sure, Petitioner told the trial judge, after the jury was sent back into deliberations after its

second dynamite instruction, that he was not requesting a mistrial. J.A. 68a-69a. He said nothing, however, when the trial judge explained that he was going to declare a mistrial *sua sponte* if the jury failed to reach a decision because "[the jurors] have been out hours and hours now[,]" and "they have indicated twice that they're hopelessly deadlocked." J.A. 69a. Petitioner did not object or make any argument that a mistrial was not warranted on capital or first-degree murder. Petitioner therefore consented to the mistrial on the entire case and cannot now be heard to complain that there was no manifest necessity warranting a mistrial on the murder offenses.

2.a. Petitioner's contention that the trial judge lacked the authority to order a mistrial of the entire case, including the murder offenses, also fails on its merits. Petitioner is essentially arguing that the Constitution mandates partial verdicts, a position his amici expressly embrace. Interpreting the Double Jeopardy Clause to require partial verdicts, however, would constitute a striking and unjustified departure from the longstanding practice of requiring only general verdicts in criminal cases.

It bears recalling that the difference between a greater offense and a lesser-included offense is the jury's finding of an additional fact. A partial verdict in the context of greater and lesser-included offenses thus equates to a "special verdict" – which has long been disfavored in criminal law for weighty reasons that still hold true. *See Mathews v. United States*, 485 U.S. 58, 72 n.3 (1988) (White, J., dissenting) ("As a

general rule special verdicts are disfavored in criminal cases.") (quoting *United States v. Buishas*, 791 F.2d 1310, 1317 (7th Cir. 1986)); G. Clementson, SPECIAL VERDICTS AND SPECIAL FINDINGS BY JURIES, 49 (1905) ("It is one of the most essential features of the right of trial by jury that no jury should be compelled to find any but a general verdict in criminal cases, and the removal of this safeguard would violate its design and destroy its spirit.") (footnotes omitted); Richard E. Myers II, *Requiring A Jury Vote of Censure to Convict*, 88 N.C. L. Rev. 137, 167 (2009) (finding that concerns with special verdicts date back at least to the famous sedition trial of John Peter Zenger, at which the jury refused to comply with the court's demand that it issue a special verdict as to the fact of publication).

As Professors Wright and Welling have explained, "The rule against special verdicts in criminal cases is nothing more nor less than a recognition of the principle that 'the jury, as conscience of the community, must be permitted to look at more than logic.'" 3 Charles Alan Wright & Sarah N. Welling, FEDERAL PRACTICE AND PROCEDURE: FEDERAL RULES OF CRIMINAL PROCEDURE 512 n.5 (4th ed. 2011) (quoting *United States v. Spock*, 416 F.2d 165, 182 (1st Cir. 1969)). Expressing related but distinct concerns, the Eleventh Circuit has held that special interrogatories in a criminal case "can unduly hinder jury deliberations by allowing the trial judge to carefully guide the

jury to its conclusion." *United States v. Birdsong*, 982 F.2d 481, 482 (11th Cir. 1993).[7]

More generally, partial verdict inquiries "no matter how carefully phrased and delivered" carry with them "significant potential for coercion." *Commonwealth v. Roth*, 776 N.E.2d 437, 447 (Mass. 2002). For example, a jury that is fatigued from deliberating and unable to reach a verdict may feel coerced to agree to a partial verdict in order to salvage the trial. Moreover, "until there is a final verdict on the entire charge, one cannot be certain whether jurors have been proffering 'compromise' votes in an attempt to reach a verdict." *Id.* at 448. In short, requiring the jury to return a partial verdict following a deadlock without allowing deliberations to fully conclude is more likely to yield a verdict that was made in the spirit of compromise, and not a just adjudication of the charged offense.

Some jurisdictions have concluded that the benefits of partial verdicts outweigh those downsides. *Whiteaker v. State*, 808 P.2d 270, 274-75 (Alaska App. 1991). Others states, however, have not. *E.g.*, *People v. Richardson*, 184 P.3d 755, 763 (2008). The Constitution permits the States to make that choice. This

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[7] In addition, as civil practice demonstrates, once a jury starts explaining itself along these specific lines, it opens the verdict up to scrutiny and increases the likelihood of inconsistent verdicts. *See, e.g.*, Fed. R. Civ. P. 49(b)(4) & (b)(5) (2011) (providing appropriate action when special verdicts are inconsistent with the general verdict, and when answers are inconsistent with each other and the general verdict).

Court has not previously suggested that the Double Jeopardy Clause imposes a uniform national rule requiring partial or special verdicts, and it should not craft such a rule now.

b. In asserting that the Double Jeopardy Clause compels partial, even special, verdicts, Petitioner and his amici also urge the very kind of rigid, mechanical rule this Court has previously refused to apply to a trial judge's exercise of discretion in discharging juries, particularly those that are deadlocked.

A trial judge's belief that the jury is unable to reach a verdict is, of course, "the classic basis for a proper mistrial," *Arizona v. Washington*, 434 U.S. at 509, and this Court affords great deference to a trial judge's decision to grant a mistrial when he considers the jury deadlocked. *Id.* at 510. That is because "if retrial of the defendant were barred whenever an appellate court views the 'necessity' of a mistrial differently from the trial judge, there would be a danger that the latter, cognizant of the serious societal consequences of an erroneous ruling, would employ coercive means to break the deadlock." *Id.* at 509-10. Therefore, this Court has "expressly declined to require mechanical application of any rigid formula when trial judges decide whether jury deadlock warrants a mistrial." *Renico v. Lett*, 130 S. Ct. 1855, 1863 (2010) (internal citation omitted).

To the contrary, "the law has invested Courts of justice with the authority to discharge a jury from giving any verdict whenever, in their opinion, taking

all the circumstances into consideration, there is manifest necessity for the act, or the ends of public justice would otherwise be defeated." *Wade*, 336 U.S. at 689-90. This rule "attempts to lay down no rigid formula." *Id.* at 690. Rather, it "command[s] courts in considering whether a trial should be terminated without judgment to take all circumstances into account, and thereby forbid[s] the mechanical application of an abstract formula." *Id.* at 691 (internal quotation marks omitted); *see also Illinois v. Somerville*, 410 U.S. 458, 464 (1973) (noting that "virtually all of the [manifest necessity] cases turn on the particular facts").

Applying this broad standard, the Court has rejected rules, for example, that categorically declare that "the absence of witnesses can never justify discontinuance of a trial," *see Wade* 336 U.S. at 691; and that a "trial on a defective indictment [always] precludes retrial." *Somerville*, 410 U.S. at 466. Nor has the Court "required a trial judge, before declaring a mistrial based on jury deadlock, to force the jury to deliberate for a minimum period of time, to question the jurors individually, to consult with (or obtain the consent of) either the prosecutor or defense counsel, to issue a supplemental jury instruction, or to consider any other means of breaking the impasse." *Renico*, 130 S. Ct. at 1864. This Court should likewise reject the rule that Petitioner and his amici apparently propose here: that a trial judge's discharge of a jury deadlocked on a single charged offense and its lesser-included offenses always requires obtaining

partial verdicts to determine which offenses may be retried.

c. The circumstances of Petitioner's case confirm that the trial judge did not abuse his discretion by declaring a mistrial on the entire case. The trial judge submitted five verdict forms to the jury, permitting verdicts of "guilty" on capital murder or one of the lesser-included offenses, or "not guilty of a homicide offense." J.A. 60a. Petitioner did not proffer any forms that purported to allow the jury to render verdicts finding him "not guilty of capital murder" or "not guilty of first-degree murder," or any associated instruction that would have reconciled those proposed partial verdicts with verdict forms that the jury had already been given – particularly the single form allowing the jury to find Petitioner "not guilty of a homicide offense."

Petitioner requested that the trial judge submit additional partial verdict forms to the jury during its deliberations, J.A. 67a-68a, a point in time which the Arkansas Supreme Court has recognized "gives the [trial] court no opportunity to react to the instructions at issue or amend them." *Young v. Johnson*, 311 Ark. 551, 555, 845 S.W.2d 510, 512 (1993); *see also Stewart v. State*, 316 Ark. 153, 158, 870 S.W.2d 752, 755 (1994) (citing *Young* and stating that "objections made to the instructions given or based on an instruction not given are untimely after the jury

retires").[8] The trial judge, moreover, observed before closing arguments that "this jury is tired," ASCR 801, and by the time Petitioner requested the partial verdicts the jury had deliberated for over four hours and had twice indicated it was deadlocked and twice heard a dynamite charge – all circumstances that can ripen into coerced verdicts. *Cf. Roth*, 776 N.E.2d at 447-48 (noting that where jurors have twice reported themselves deadlocked and have heard the equivalent of a dynamite charge, a partial-verdict inquiry "by its nature, plays on the deadlocked jurors' natural sense of frustration, disappointment, and failure"). Under these circumstances, the trial judge did not abuse his discretion by denying Petitioner's request because the verdict forms and instructions had already been submitted to the jury, and "to go back and then change at this time . . . would create a mistrial within itself and that would not be appropriate." J.A. 68a.

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[8] Rule 33.7 of the Arkansas Rules of Criminal Procedure (2011) permits trial judges to "recall the jury after it has retired to deliberate and give it additional instructions in order to: correct or withdraw an erroneous instruction; clarify an ambiguous instruction, or inform the jury on a point of law that should have been covered by the original instructions."

CONCLUSION

The judgment of the Supreme Court of Arkansas should be affirmed.

Respectfully submitted,

DUSTIN MCDANIEL
Arkansas Attorney General

DAVID R. RAUPP*
Senior Assistant Attorney General

EILEEN W. HARRISON
LAUREN ELIZABETH HEIL
VALERIE GLOVER FORTNER
Assistant Attorneys General

OFFICE OF THE ATTORNEY GENERAL
323 Center Street, Suite 200
Little Rock, AR 72201
(501) 682-3657
(501) 682-2083
david.raupp@arkansasag.gov

**Counsel of Record*

Of Counsel:

DAN SCHWEITZER
2030 M Street, NW
8th Floor
Washington, DC 20036
(202) 326-6000

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REPLY BRIEF

No. 10-1320

In the Supreme Court of the United States

ALEX BLUEFORD,
Petitioner,

v.

STATE OF ARKANSAS,
Respondent.

On Writ of Certiorari to the Arkansas Supreme Court

REPLY BRIEF FOR PETITIONER

WILLIAM R. SIMPSON, JR.
SHARON KIEL
CLINT MILLER
SIXTH JUDICIAL DISTRICT (ARKANSAS) PUBLIC DEFENDERS OFFICE
201 S. Broadway, Ste. 210
Little Rock, AR 72201
(501) 340-6120

CLIFFORD M. SLOAN
Counsel of Record
GEOFFREY M. WYATT
DAVID W. FOSTER
MOSHE SPINOWITZ
SKADDEN, ARPS, SLATE, MEAGHER & FLOM LLP
1440 New York Ave., N.W.
Washington, DC 20005
(202) 371-7000
cliff.sloan@skadden.com

TABLE OF CONTENTS

Page

Table of Authorities ii

Reply Brief for Petitioner 1

I. The Jury Explicitly Declared Its Vote of Not Guilty on Capital Murder and First-Degree Murder. 3

II. The Acquittal-First Instructions Bar Retrial on the Murder Charges. 12

III. Double Jeopardy Bars Retrial on the Murder Charges Because the Jury Had a Full Opportunity to Convict on the Murder Charges. 16

IV. No Manifest Necessity Exists for a Mistrial on the Murder Charges. 19

Conclusion 23

TABLE OF AUTHORITIES

Cases

Arizona v. *Washington*,
434 U.S. 497 (1978) 6

Ashe v. *Swenson*,
397 U.S. 436 (1970) 8

Burks v. *United States*,
437 U.S. 1 (1978) 8

Commonwealth v. *Roth*,
776 N.E.2d 437 (Mass. 2002) 10

Downum v. *United States*,
372 U.S. 734 (1963) 21

Green v. *United States*,
355 U.S. 184 (1957) 1, 2, 16, 17, 18, 19, 23

Hughes v. *State*,
66 S.W.3d 645 (Ark. 2002) 13, 15

Jackson v. *Virginia*,
443 U.S. 307 (1979) 14

Oregon v. *Kennedy*,
456 U.S. 667 (1982) 20

People v. *Richardson*,
184 P.3d 755 (Colo. 2008) 15

Porter v. *State*,
191 S.W.3d 531 (Ark. 2004) 13

Price v. *Georgia*,
398 U.S. 323 (1970) 1, 2, 16, 17, 18, 19

Renico v. *Lett*,
130 S. Ct. 1855 (2010) 10, 21, 22

Sanabria v. *United States*,
437 U.S. 54 (1978) 5, 10

Selvester v. *United States*,
170 U.S. 262 (1898) 23

Smith v. *Massachusetts*,
543 U.S. 462 (2005) 10

State v. *Fielder*,
118 P.3d 752 (N.M. Ct. App. 2005) 22

State v. *Tate*,
773 A.2d 308 (Conn. 2001) 18, 22

Stone v. *Superior Court*,
646 P.2d 809 (Cal. 1982) 18, 22

United States v. *Ball*,
163 U.S. 662 (1896) 5

United States v. *DiFrancesco*,
449 U.S. 117 (1980) 8

United States v. *Jorn*,
400 U.S. 470 (1971) 20, 23

United States v. *Martin Linen Supply Co.*,
430 U.S. 564 (1977) 5

United States v. *Moccia*,
681 F.2d 61 (1st Cir. 1982) 15

United States v. *Perez*,
9 Wheat. 579 (1824) 19

United States v. *Tsanas*,
572 F.2d 340 (2d Cir. 1978) 15

Wade v. *Hunter*,
336 U.S. 684 (1949) 22

Weeks v. *Angelone*,
528 U.S. 225 (2000) 14

Whiteaker v. *State*,
808 P.2d 270 (Alaska Ct. App. 1991) 18, 22

In re Winship,
397 U.S. 358 (1970) 14

Other Authorities

6 Wayne R. LaFave et al., *Criminal Procedure*
(3d ed. 2007) 20

REPLY BRIEF FOR PETITIONER

The Double Jeopardy Clause bars retrial of Alex Blueford for capital murder and first-degree murder.

The essential fact in this case is that, as stated by both the Arkansas trial court and the Arkansas Supreme Court, "the jury foreperson was explicit that the jury was unanimous in voting against finding Defendant Blueford guilty of capital murder and first degree murder." Pet. App. 6a, 15a-16a.

The State argues that the unanimous jury votes against guilt have no Double Jeopardy consequences. The State's theory is that, because (1) the trial court refused to allow the jury to give effect to its votes against guilt in verdict forms or by some other means and (2) the court ordered the jury to continue deliberating without that opportunity, the jury's votes against guilt have no Double Jeopardy effect.

The State's proposed rule of law conflicts with the language and core purpose of the Double Jeopardy Clause, as well as with decisions of this Court recognizing that allowing acquittal avoidance would eviscerate this fundamental constitutional right.

It is significant for Double Jeopardy purposes, moreover, that the jury had been instructed that it could reach a lesser offense only if it had a reasonable doubt on greater offenses—and that the jury reported, in addition to the unanimous votes against guilt on murder, a deadlock on manslaughter, a lesser included offense of the murder charges. Even if those sequenced instructions had not been given, it likewise is significant, under *Green* v. *United States*, 355 U.S. 184 (1957), and *Price* v. *Georgia*, 398 U.S. 323 (1970), that the jury reported its deadlock on the

lesser offense while refusing to convict on the greater offenses.

Nor is it irrelevant for Double Jeopardy purposes that the State, after successfully preventing the unanimous votes against guilt from being given effect, seeks a retrial of those very charges after a trial in which the State's circumstantial case on capital murder and first-degree murder was demolished by the defense. See Pet. Br. 3-8. *Blueford* presents a paradigmatic case of a specter that, this Court has emphasized, the Double Jeopardy Clause prevents—allowing the government to evade the acquittal consequences of a weak case and refine its efforts in a retrial with knowledge of the weaknesses of the government's case.

As explained in Petitioner's opening brief, permitting the retrial of Alex Blueford for capital murder and first-degree murder violates the Double Jeopardy Clause for three separate reasons: (1) the jury announced that it had unanimously voted to acquit him; (2) the structure of the instructions required the jury to find him not guilty on greater offenses before proceeding to lesser offenses; and (3) under *Green* and *Price*, the jury's explicit deadlock on a lesser-included offense and failure to convict on greater offenses bar re-prosecution on the greater offenses. In addition to disputing these points, the State defends the manifest necessity for a mistrial on the murder charges by asserting waiver and perceived necessity. Both arguments are unavailing.[1]

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[1] Petitioner does not dispute that he may be retried on manslaughter and negligent homicide.

I. The Jury Explicitly Declared Its Vote of Not Guilty on Capital Murder and First-Degree Murder.

The jury's explicit statement of its unanimous votes against guilt is not subject to dispute:

- In open court, on the record, the trial court asked the jury foreperson ("Juror Number One") for the jury's "numbers * * * on capital murder." App. 64.
- The foreperson replied, "That was unanimous against that." *Ibid.*
- The trial court asked the foreperson about the jury's vote regarding "murder in the first degree." *Id.* at 65.
- The foreperson again replied, "That was unanimous against that." *Ibid.*
- The trial court then asked for the count on "[m]anslaughter." *Ibid.*
- The foreperson replied, "Nine for, three against." *Ibid.*

The State maintains that the foreperson's reports lacked sufficient clarity, formality, and finality to have Double Jeopardy consequences. The State is mistaken.

Clarity — The State's suggestion that the foreperson's statement was not sufficiently clear is not tenable. The State asserts that "there is no confirmation in the record that [the foreperson's] report accurately reflected each juror's vote or reasons for it." State Br. 18. The State also maintains that "the foreperson's report that the jury was unanimously

against the murder charges is inconsistent with the written message sent by the jury that it 'cannot agree on any one charge.'" *Ibid.* (quoting App. 64). Neither contention undermines the clarity of the foreperson's statement.

The record provides no reason to doubt the foreperson's explicit report. The State's apparent suggestion that additional "confirmation in the record" is necessary is supported neither by the law nor by the transcript. Indeed, the State did not challenge the clarity or accuracy of the foreperson's report.[2] The State's objection that the foreperson's report lacked the "reasons for" the jury's unanimous votes (State Br. 18) is bizarre: a jury has no obligation to explain the "reasons for" its votes.

The State's further suggestion that the foreperson's statement was not sufficiently clear because the jury previously had sent a note about its inability to agree similarly is unavailing. *After* receiving that note from the jury, the trial judge asked for the jury's votes on each charge and received the requested information. Again, moreover, both the trial court and the Arkansas Supreme Court recognized that there was no lack of clarity in the foreperson's report (Pet.

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[2] None of the other jurors present during the foreperson's report of their "unanimous" vote against guilt on the murder charges disputed it. In contrast, in open court during deliberations, jurors freely interjected on other points. See, *e.g.*, Arkansas Supreme Court Record ("ASCR") 861 (Juror Four asks about review of evidence); *id.* at 866 (Juror Five comments on cell phone availability). The State never asked to poll the jury about the foreperson's report.

App. 6a, 15a-16a), and neither suggested that the jury's previous note undermined that clarity.

Formality — Four points refute the State's second contention—that the foreperson's statement lacked formality (because it was merely a "colloquy," State Br. 16, or a "report," *ibid.*).

First, this Court has been clear that a lack of formality does not prevent a determination of innocence from having Double Jeopardy effect—whether by a jury, as in *United States* v. *Ball*, 163 U.S. 662, 671 (1896) (the fact that a jury verdict was not embodied in a judgment does not weaken its Double Jeopardy consequences), or by the court, *United States* v. *Martin Linen Supply Co.*, 430 U.S. 564, 571-572 (1977) ("label" does not determine whether ruling is acquittal in substance). Putting the *timing* of the foreperson's statement temporarily to one side (see *infra*, 8-11), there can be no doubt that the explicit account of the jury's unanimous vote against guilt may not be disregarded simply because it lacked additional indicia of formality. "[F]orm is not to be exalted over substance" in considering Double Jeopardy consequences. *Sanabria* v. *United States*, 437 U.S. 54, 66 (1978) (citation omitted).

Second, the announcement of the unanimous jury votes was far from casual. It represented the foreperson's formal response to the court's explicit inquiry regarding the jury's votes on capital murder and first-degree murder. App. 64-65. This formal response was in open court and on the record. *Ibid.*

Third, the State is particularly ill-positioned to argue that the report of the jury's vote lacked sufficient formality because the State played a major role

in preventing additional formality. Petitioner requested greater formality through the submission of verdict forms that would have allowed the jury to record the votes it had expressed. App. 67-68. The State immediately "argue[d] against that," *id.* at 68, and it thus rings hollow for the State now to demand additional formality.

Fourth, the State's formality objection raises precisely the dangers of acquittal avoidance that this Court repeatedly has refused to countenance. See generally *Arizona* v. *Washington*, 434 U.S. 497, 507 (1978) ("Although there was a time when English judges served the Stuart monarchs by exercising a power to discharge a jury whenever it appeared that the Crown's evidence would be insufficient to convict, the prohibition against double jeopardy as it evolved in this country was plainly intended to condemn this 'abhorrent' practice.") (footnote omitted).

In light of the Double Jeopardy Clause's protection against the "abhorrent" practice of acquittal avoidance, the flimsiness of the State's case on the murder charges is particularly noteworthy. As explained in Petitioner's opening brief (at 3-5), the State's principal witness on causation (and on the corresponding inference about Petitioner's mental state and intent) was the state medical examiner who performed the autopsy, Dr. Adam Craig. Cross-examination and medical experts established that Dr. Craig, who had failed his board exams in anatomical pathology five times and had never passed them, badly botched the autopsy; he also had failed to consider leading articles establishing that Matthew McFadden's tragic injuries were entirely consistent with the accident described by Petitioner. *Id.* at 4-8.

The State says almost nothing about Dr. Craig's testimony. Instead, the State emphasizes Petitioner's changing accounts about what happened. But Petitioner testified at length about his conflicting stories, and the State vigorously cross-examined him. ASCR 644, 671-678. The jury heard his testimony (even, during deliberations, asking for and receiving an opportunity to listen again to the tape of Petitioner's final police interview, *id.* at 866) and voted against guilt on the murder charges.

The State also seeks to invoke the testimony of hospital physicians. State Br. 3-4. There can be no dispute, however, that the State's causation argument—its theory that the injuries were inflicted by Petitioner slamming McFadden to the ground—relied principally on Dr. Craig's autopsy and testimony. See, *e.g.*, ASCR 534 (Detective Hudson: "fair to say" that "what got the wheels in motion in this case was driven by the autopsy").[3] Nor was the jury alone in doubting that the State had proven capital murder: when the State rested, the trial judge observed that "certainly the State's case is circumstantial at best and probably this may be a lesser included offense case." *Id.* at 610.[4]

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[3] The State's selective recounting of evidence ignores testimony by hospital physicians consistent with Petitioner's explanation of the accident. See, *e.g.*, ASCR 273-274, 571.

[4] The State notes (at 2) that Petitioner did not contact McFadden's mother after an initial encounter, but it does not mention Petitioner's testimony that the woman's mother—McFadden's grandmother—asked him not to contact the mother. ASCR 666.

It thus may be no surprise that the State flatly opposed any effort to allow the jury to express again its unanimous votes on the murder charges and that the State instead requested a mistrial on all charges. App. 68. But the Constitution prohibits such acquittal avoidance, despite a claim of inadequate formality.[5]

Finality — The State's third justification for ignoring the foreperson's announcement of the jury's unanimous votes—finality—also cannot carry the day. The State's suggestion (at 18) that the foreperson's report was "anything but final" regarding murder is incorrect. The foreperson's statement was the last word from the jury, on this record, regarding the capital murder and first-degree murder charges; accordingly, it was the final statement on those charges that the jury was allowed to render in this case. Again, moreover, it was the State that objected—successfully—to enabling the jury to provide any further information on the capital murder and first-degree murder charges. The jury's final word on the murder charges was the foreperson's announcement of the unanimous votes "against guilt."[6]

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[5] See, *e.g.*, *United States* v. *DiFrancesco*, 449 U.S. 117, 128 (1980); *Burks* v. *United States*, 437 U.S. 1, 11 (1978); *Ashe* v. *Swenson*, 397 U.S. 436, 447 (1970).

[6] The State concedes that "[t]his might be a more difficult case if the jury reported at the *end of deliberations* that it had voted unanimously against guilty on the murder offenses but was hung on the manslaughter offense." State Br. 19-20. As the case comes to the Court, however, that is exactly how it should be viewed: the jury's report of its unanimous votes was the jury's last word on this subject.

The State claims that the jury might have changed its mind and (notwithstanding the glaring weaknesses in the State's case) gone on to abandon its unanimous votes against guilt on the murder charges. Nothing in the record provides a shred of evidence to support this speculation. The State points to the jury's general statement after further deliberation that it was deadlocked. State Br. 21; see also App. 69. But the jury was prevented by the court (at the State's behest, *id.* at 68) from saying anything further about the murder charges. In the jury's view, moreover, it clearly was consistent to report a deadlock and to have unanimous votes against guilt on capital murder and first-degree murder. That is exactly what had happened when the judge made his formal inquiry about the votes. *Id.* at 64-65. The record provides no reason to indulge the State's speculation that the jury might have changed its previously expressed unanimous votes against guilt on the murder charges—which were reported to the court only thirty-one minutes before the judge declared a mistrial and dismissed the jury. See *id.* at 67 (jury sent back after its report of unanimous votes against guilt at 9:28 p.m.); *id.* at 69 (court declares mistrial at 9:59 p.m.).

In support of its finality point, the State suggests that the jury simply deadlocked—that its process must be treated as a traditional black box, and that a retrial on all charges thus is appropriate. See, *e.g.*, State Br. 19. The State overlooks the important point, however, that the trial court's inquiry about the jury's votes compelled disclosure of the jury's votes on the murder charges. That on-the-record inquiry cannot now be stuffed back into the black box and ignored. When, as in this case, there is nothing

to undermine or supersede the clarity or accuracy of such a jury report, and no reason on the record to think that it changed, the jury report must be given effect.

It may well be that a judge has no duty to undertake an inquiry of the kind undertaken here. Cf. *Renico* v. *Lett*, 130 S. Ct. 1855, 1861 (2010) (trial judge told jury: "I don't want to know what your verdict might be, or how the split is"). But, when a judge asks a jury for its vote on particular charges and receives a jury's answer of unanimous votes of not guilty, and when nothing subsequently undermines or supersedes the jury's explicit response, the colloquy has Double Jeopardy consequences and may not be ignored under the banner of the jury's black box.[7]

For similar reasons, the State's justification for the refusal to give the jury verdict forms is flawed. Like the trial court, the State suggests that the submission of such forms would have been "changing horses in the middle of the stream" and would have led to "a mistrial." App. 68; State Br. 7, 39-40. But when the court formally asked the foreperson for the jury's votes—and when the foreperson announced

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[7] See generally *Smith* v. *Massachusetts*, 543 U.S. 462, 474-75 (2005) (although state has discretion to structure method for acquittal motions, state's choice has Double Jeopardy consequences); *Sanabria*, 437 U.S. at 66 (although district court's ruling was erroneous, erroneous ruling has Double Jeopardy consequences); *Commonwealth* v. *Roth*, 776 N.E.2d 437, 450 (Mass. 2002) (although judge should not have asked jury about vote on greater and lesser offenses, jury's response to erroneous inquiry has Double Jeopardy consequences).

that the jury had voted unanimously against guilt on the murder charges—the "stream" of the trial fundamentally changed. The foreperson, in open court, had made an announcement of considerable constitutional significance.[8]

In sum, the report of the jury's unanimous votes on capital murder and first-degree murder did not lack clarity or requisite formality; and it was the jury's last word on the subject on this record. The core principle of the Double Jeopardy Clause—that a defendant cannot be forced to run the gantlet a second time on charges for which a jury has found the defendant not guilty—protects Alex Blueford from a second trial on murder charges.[9]

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[8] The statement that a "mistrial" would have resulted from granting the defendant's request to allow the jury to record its expressed vote in a verdict form likewise is not tenable. Granting *the defendant's* request could not plausibly have led to a successful motion for a mistrial *by the defendant* on the ground that his request had been granted. The State also notes (at 39) that Petitioner did not initially object to the verdict forms submitted to the jury (although the State does not explicitly claim waiver on this point). That observation also is unavailing. Whether through verdict forms or some other means, once the court had received the jury's reports of unanimous votes against guilt on murder, it was obligated either to take some action in response or to accord Double Jeopardy consequences when the State sought retrial on those charges.

[9] Amici erroneously suggest that giving Double Jeopardy significance to the jury's explicit report would conflict with federal procedure. State Amici Br., 3-7. The cited cases are inapposite. They involve either violations of Fed. R. Crim. P. 31 (which includes a permissive provision on

II. The Acquittal-First Instructions Bar Retrial on the Murder Charges.

The jury's announcement that it was deadlocked on manslaughter has Double Jeopardy consequences for a separate reason: the jury instructions prevented the jury from reaching manslaughter unless it acquitted on capital murder and first-degree murder. See Pet. Br. 24-30.

The State makes two arguments. First, it contends that Arkansas's jury instructions are not truly "acquittal first" instructions. Second, it contends that, in any event, the Arkansas instructions permit the jury to "step back" and reconsider a determination of not guilty on greater offenses.

The State is incorrect that the Arkansas instructions are not "acquittal first" or "hard transition" instructions. They require acquittal on a greater offense before the jury may consider a lesser offense. According to the State, the acquittal-first characterization "elevates jargon that does not appear in Arkansas law over the actual instructions given." State Br. 21. The Arkansas Supreme Court, however, has described the jury instructions at issue in precisely those terms:

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jury polling) or problems that emerged when the jury was polled or the verdict read (or, in one instance, a decision of this Court in a civil case, to which the Double Jeopardy Clause is not applicable). None addresses the Double Jeopardy consequences of a clearly expressed jury announcement in open court of unanimous votes against guilt. Given the prominence of this federal argument by state amici, moreover, it is notable that the United States has not filed a brief supporting the judgment.

> "Before it may consider any lesser-included offense, the jury must first determine that the proof is insufficient to convict on the greater offense. *Thus, the jury must, in essence, acquit the defendant of the greater offense before considering his or her guilt on the lesser-included offense.*" *Hughes* v. *State*, 66 S.W.3d 645, 651 (Ark. 2002) (emphasis added).[10]

The Arkansas Supreme Court also has explained that the instruction given to Blueford's jury "allows the jury to consider the lesser-included offense *only if* the jury has a reasonable doubt of the defendant's guilt on the charge of capital murder." *Porter* v. *State*, 191 S.W.3d 531, 534 (Ark. 2004) (emphasis added).

This characterization accords with the plain language of the instructions. In four separate pattern instructions, the court instructed the jury that the jury's determination of a reasonable doubt on the greater offense was a predicate to its proceeding to a lesser offense. The court instructed the jury that, *if* it had a reasonable doubt on the greater offense, then it could proceed to the lesser offense.[11] The State emphasized precisely that point—the requirement of a unanimous acquittal on a greater offense before consideration of the lesser offense—four times in its

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[10] The Arkansas Supreme Court cited *Hughes* below. Pet. App. 8a.

[11] See App. 51 ("*If* you have a reasonable doubt of the defendant's guilt on the charge of capital murder, you will consider the charge of murder in the first degree") (emphasis added); *id.* at 51-52.

closing arguments.[12] To the extent that the State suggests that the language does not require "acquittal first" because the instructions use the term "reasonable doubt" rather than "acquittal" (see State Br. 25), this Court's decisions reject the argument: as a matter of constitutional command, a reasonable doubt equates to acquittal. *Jackson* v. *Virginia*, 443 U.S. 307 (1979); *In re Winship*, 397 U.S. 358 (1970).

In addition, the jury in this case clearly understood the instructions with the meaning revealed by their plain language and confirmed by the Arkansas Supreme Court. See App. 65 (Foreperson: "We couldn't get past the manslaughter. * * * I thought we were supposed to go one at a time."). Juries are presumed to follow instructions, *Weeks* v. *Angelone*, 528 U.S. 225, 234 (2000), and this one plainly did so.

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[12] See App. 55 ("[B]efore you can consider a lesser included offense of capital murder, you must first, all 12, vote that this man is not guilty of capital murder before you can even move on to the lesser included offenses"); *ibid.* ("[Y]ou don't even get to this instruction [regarding first-degree murder] until all 12 of you are able to vote that you do not believe this man is guilty of capital murder"); *ibid.* ("if you all 12 vote that he is not guilty of murder in the first degree, then there is manslaughter"); *id.* at 59 ("unless all 12 of you agree that this man's actions were not consistent with capital murder, then and only then would you go down to murder in the first degree."); see also *ibid.* ("You never need to consider murder in the first degree. You never need to consider manslaughter. You never need to consider negligent homicide.").

Accordingly, despite the State's protestations, the jury instructions here fit comfortably in the category of "acquittal first" or "hard transition" instructions.[13]

The State's second contention fares no better. The sequenced structure of the instructions has no Double Jeopardy consequences because, the State speculates, the jury in this case might have reconsidered its not-guilty determinations on capital murder and first-degree murder. State Br. 25-26. But there is nothing in the record to indicate that the jury, in fact, did step back and reconsider in the thirty-one minutes between its expression of unanimous votes against guilt and the court's declaration of a mistrial.

The State emphasizes that the instructions do not explicitly prohibit a jury from stepping back and reconsidering after it has reached a determination of reasonable doubt on greater offenses. But the more pertinent linguistic point is that nothing in the instructions advises the jury that it may or should engage in such reconsideration. Instead, the instructions contemplate, as the Arkansas Court has authoritatively construed, that "the jury must, in essence, acquit the defendant of the greater offense before considering his or her guilt on the lesser-included offense." *Hughes*, 66 S.W.3d at 651. The

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[13] State courts often refer to hard-transition instructions as "acquittal first" instructions. See, *e.g.*, *People* v. *Richardson*, 184 P.3d 755, 764 n.7 (Colo. 2008). Federal courts similarly have understood instructions like those here to require not-guilty determinations before consideration of lesser offenses. See *United States* v. *Tsanas*, 572 F.2d 340, 346 (2d Cir. 1978) (Friendly, J.); *United States* v. *Moccia*, 681 F.2d 61, 64 (1st Cir. 1982) (Breyer, J.).

State is asking this Court to read into the instructions a gloss never adopted by the Arkansas courts and not given to the jury in this case.[14]

The court instructed the jury that it could proceed to a lesser offense only if it found against guilt on a greater offense. Accordingly, when the jury reported that it had proceeded to a lesser offense and deadlocked on that lesser offense (and when nothing superseded that report), the Double Jeopardy Clause barred retrial on the greater offenses.

III. Double Jeopardy Bars Retrial on the Murder Charges Because the Jury Had a Full Opportunity to Convict on the Murder Charges.

Green and *Price* held that a retrial could not proceed on a greater offense after a conviction on a lesser-included offense and a failure to convict on greater offenses (even though the conviction on the lesser offense subsequently was reversed). Here, Double Jeopardy likewise prohibits retrial after the jury's deadlock on a lesser-included offense and failure to convict on greater offenses.

The State maintains that *Green* and *Price* are inapplicable for two reasons. First, the State again

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[14] As pointed out in our opening brief (at 18 n.5), the jury could have corrected or changed its announcement, but it did not do so. In suggesting that Petitioner's position depends on the proposition that subsequent convictions would have been impermissible (if they had occurred), the amici States are incorrect. See State Amici Br. 11. Amici also conflate two different propositions—what the instructions provide (*i.e.*, whether they include a "step-back" procedure) and what a jury may do.

argues that the foreperson's announcement must be disregarded. Second, the State argues that, even if that announcement is considered, the principles of *Green* and *Price* permit retrial. Both contentions are unavailing.

The State first contends yet again that the foreperson's announcement should be disregarded, but that argument falls short for the reasons previously discussed. See pages 3-11, *supra*.

The State next makes much of the difference between a deadlock and a conviction, and says that, in light of a deadlock's indefinite character, *Green* and *Price* are not applicable. State Br. 30-32. The State overlooks the fact, however, that this Court explicitly held in *Green* that its Double Jeopardy conclusion rested, not on the conviction on the lesser offense, but rather on *the failure to convict on the greater offense*: "Green's claim of former jeopardy is not based on his previous conviction for second degree murder but instead on the original jury's refusal to convict him of first degree murder." 355 U.S. at 190 n.11.

The State also emphasizes that "a charged offense and its lesser-included offenses are one charge" (State Br. 31), with the apparent suggestion that Double Jeopardy principles are different from what they would be in a context of separate counts. But the State ignores the Court's admonition that "[i]n substance the situation was the same as though Green had been charged with these different offenses in separate but alternative counts of the indictment. The constitutional issues at stake here should not turn on the fact that both offenses were charged to

the jury under one count." *Green*, 355 U.S. at 190 n.10.[15]

Furthermore, Blueford should not be put in a *less favorable* Double Jeopardy position because the State could not secure his conviction on manslaughter than if the State had been successful in securing that conviction. See Pet. Br. 32. The case for Double Jeopardy here is, if anything, stronger than in *Green* and *Price*, where the jury convicted on the lesser offense. Here, unlike in *Green* and *Price*, the government could not convince all jurors to convict even on the lesser offense. The State's position is that Blueford should be in a worse position as a result of the deadlock. Such a result makes no sense in light of the language and purpose of the Double Jeopardy Clause.[16]

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[15] See generally *Whiteaker* v. *State*, 808 P.2d 270, 274 (Alaska Ct. App. 1991) ("[W]hether the prosecutor charges the accused in multiple count indictment or single-count indictment for an offense involving lesser-included offenses, the defendant's double jeopardy rights are the same."); *State* v. *Tate*, 773 A.2d 308, 322 n.13 (Conn. 2001) (same).

[16] See *Stone* v. *Superior Court*, 646 P.2d 809, 815 n.5 (Cal. 1982) ("[P]rior to this case a criminal defendant who was actually convicted of * * * [a] lesser included offense was given greater double jeopardy protection than the arguably less culpable defendant who * * * was not convicted of anything. The convicted defendant clearly could not be retried on the greater charge; ironically, it is here contended that the defendant whose jury deadlocked only on the lesser offense could be retried even on the greater charged offense.").

Here, the jury explicitly deadlocked on the lesser offense (manslaughter) and, as in *Green* and *Price*, refused to convict on the greater offenses (the murder charges); here, as in *Green* and *Price*, the jury "was given a full opportunity to return a verdict and no extraordinary circumstances appeared which prevented it from doing so." *Green*, 355 U.S. at 190-91. As in *Green* and *Price*, the Double Jeopardy Clause bars retrial on the greater offenses.

IV. No Manifest Necessity Exists for a Mistrial on the Murder Charges.

In light of the foreperson's explicit statement of a deadlock on a lesser offense and the refusal to convict on capital murder and first-degree murder, this case presented no "manifest necessity" for a retrial on the murder charges. See Pet. Br. 28-30, 32-33; see generally *United States* v. *Perez*, 9 Wheat. 579 (1824). The State maintains that this argument was waived and that it is erroneous. The State is incorrect on both.

First, regarding waiver, the State suggests (at 34) that Petitioner "consented to the mistrial on the entire case." The record is clear, however, that Petitioner's position was that a mistrial was appropriate *only if the jury was given an opportunity to proceed with its unanimous acquittal votes through verdict forms*:

> "[Petitioner's counsel]: Your Honor, we would ask that the jury be given verdict forms and that they fill out verdict forms for those counts that they have reached a verdict on. *And if there remains a hung jury on the remaining*

> *counts, then so be it.*" App. 67 (emphasis added).

The straightforward reading of Petitioner's contemporaneous request is that Petitioner agreed to a mistrial on the lesser offenses so long as the jury was permitted to express its votes on the murder charges in a verdict form.[17] The fact that Petitioner did not renew this request, after the trial court had flatly rejected it, when the trial court dismissed the jury thirty-one minutes later does not in any way undermine the validity, force, or effect of Petitioner's expressed position.[18] The Arkansas Supreme Court, moreover, did not rely on any finding of waiver, and did not hold that waiver prevented its discussion and analysis of the merits. See Pet. App. 12a-14a. Petitioner did not waive an objection to retrial on the murder charges.

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[17] See also App. 69 (Petitioner's Counsel: "We are not asking for a mistrial at this point * * *.").

[18] Even if Petitioner's counsel had been silent regarding the mistrial—which she was not, App. 67—silence, in the context of a mistrial, is not consent. See 6 Wayne R. LaFave et al., *Criminal Procedure* § 25.2(a) & n.9 (3d ed. 2007) ("Mere silence is a far cry from consent or waiver," especially when a defendant has previously "provided the court with [an] alternative to mistrial.") (citation omitted); see also *United States* v. *Jorn*, 400 U.S. 470, 486-487 (1971) (Harlan, J., plurality) (Double Jeopardy barred retrial after *sua sponte* mistrial despite defendant's lack of objection) *id.* at 488-489 (concurrence in judgment). The State erroneously relies (at 33) on *Oregon* v. *Kennedy*, 456 U.S. 667 (1982), in which the defendant *requested* a mistrial, a context in which "quite different principles" apply. *Id.* at 672.

On the merits, the State proceeds from a flawed premise. The State argues that "[p]etitioner is essentially arguing that the Constitution mandates partial verdicts" by contending that "the trial judge lacked the authority to order a mistrial of the entire case" because there was no manifest necessity on the murder charges. State Br. 34. In the State's view, it follows from Petitioner's argument that the Double Jeopardy Clause "always requires obtaining partial verdicts" in cases with lesser-included offenses. *Id.* at 38-39. This characterization is incorrect.

As Petitioner explained in the opening brief, his position rests, not on a right to a "partial verdict" in all circumstances, but rather on the fact that the record revealed no manifest necessity for a mistrial on the murder charges (even if the acquittal and acquittal avoidance consequences of the jury's announcement of unanimous votes against guilt were not dispositive). See Pet. Br. 28-30, 32-33. Here, the jury explicitly announced its deadlock on a single lesser offense (manslaughter) and refused to convict on the greater offenses (the murder charges). In the circumstances presented here, in which the trial court's inquiry elicited a jury announcement of deadlock only on manslaughter, the trial court simply was not faced with the situation of a reported deadlock on the murder charges. The trial court thus was not presented with the "'classic example'" for a mistrial on the murder charges (*Renico*, 130 S. Ct. at 1863 (quoting *Downum* v. *United States*, 372 U.S. 734, 736 (1963)))—a deadlock on those charges. With regard to the murder charges, the record thus does not provide an adequate basis for denying a defendant his "valued right to have his trial completed by a particu-

lar tribunal." *Wade* v. *Hunter*, 336 U.S. 684, 689 (1949).

The State erroneously says that a conclusion of no manifest necessity in this case would require a right to jury inquiries on "partial verdicts," even in contexts beyond an on-the-record inquiry of a kind like that which occurred here. State Br. 34-35. But this case does not require the Court to resolve the issue of manifest necessity—or, in the State's parlance, "partial verdicts"—in contexts lacking such an on-the-record inquiry. A conclusion of no manifest necessity on the murder charges requires only application of the settled principle that there must be a "high degree of necessity," *Renico*, 130 S. Ct. at 1858, before the determination that a mistrial and retrial are appropriate: the usual predicate for that determination—a deadlock on the charges in question—is not presented by the jury's announcement of a deadlock only on the manslaughter charge.[19]

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[19] Even if the general issue of a duty of judicial inquiry on greater and lesser offenses were considered, the State and its amici misapprehend the nature of such an inquiry. First, contrary to their suggestion (*e.g.*, State Br. 36-37), state courts in hard-transition jurisdictions that mandate such an inquiry do so, not as a matter of state discretion, but rather pursuant to the Double Jeopardy Clause. See, *e.g.*, *Tate*, *supra*; *Stone*, *supra*; *Whiteaker*, *supra*; *State* v. *Fielder*, 118 P.3d 752, 758 (N.M. Ct. App. 2005). Second, inquiring about a jury's vote regarding greater and lesser offenses is an inquiry into a jury's votes, not its reasons, and thus is neither an impermissible intrusion into the jury's domain, *Tate*, 773 A.2d at 324 n.15, nor a disfavored "special verdict" (State Br. 34-36). Third, this Court has emphasized that Double Jeopardy principles are the same

CONCLUSION

"A power in government to subject the individual to repeated prosecutions for the same offense would cut deeply into the framework of procedural protections which the constitution establishes for the conduct of a criminal trial." *Jorn*, 400 U.S. at 479 (Harlan, J.). The Constitution protects Alex Blueford from a second prosecution on the charges for which a jury already has openly and unanimously declared him not guilty. The judgment should be reversed.

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in the contexts of greater-and-lesser offenses and separate counts. See *Green*, 355 U.S. at 190 n.10 (same Double Jeopardy principles apply to multiple counts and to greater and lesser offenses). It is, of course, common and routine to inquire about a jury's votes on different counts. See, *e.g.*, *Selvester* v. *United States*, 170 U.S. 262, 267 (1898) ("Each count is, in fact and theory, a separate indictment," and subject to separate votes and consequences) (internal quotation marks omitted). Asking about votes on greater and lesser offenses is no more intrusive than asking about votes on separate counts.

Respectfully submitted,

WILLIAM R. SIMPSON, JR.
SHARON KIEL
CLINT MILLER
SIXTH JUDICIAL DISTRICT (ARKANSAS) PUBLIC DEFENDERS OFFICE
201 S. Broadway
Suite 210
Little Rock, AR 72201
(501) 340-6120

CLIFFORD M. SLOAN
Counsel of Record
GEOFFREY M. WYATT
DAVID W. FOSTER
MOSHE SPINOWITZ
SKADDEN, ARPS, SLATE, MEAGHER & FLOM LLP
1440 New York Ave., NW
Washington, DC 20005
(202) 371-7000
cliff.sloan@skadden.com

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ALEX BLUEFORD,
PETITIONER,
v.
STATE OF ARKANSAS,
RESPONDENT.

ON WRIT OF CERTIORARI TO THE
ARKANSAS SUPREME COURT

BRIEF OF *AMICI CURIAE* CRIMINAL LAW PROFESSORS IN SUPPORT OF PETITIONER ALEX BLUEFORD (FULL LIST OF *AMICI* ON INSIDE FRONT COVER)

LISA S. BLATT
CHARLES G. CURTIS, JR.
Counsel of Record
ARNOLD & PORTER LLP
555 12th Street, NW
Washington, DC 20004
(202) 942-5000
Charles.Curtis@aporter.com

Counsel for Amici Curiae

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

Law Library

Amici Curiae Criminal Law Professors:

George C. Thomas III

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Russell Covey

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Michael J.Z. Mannheimer

Lawrence C. Marshall

Jonathan A. Rapping

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Laurent Sacharoff

Christopher Slobogin

Carol Steiker

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

INTEREST OF *AMICI CURIAE* 1

SUMMARY OF THE ARGUMENT 2

ARGUMENT 5

I. The Jury's Pronouncement in Open Court Was a Substantive Ruling in Blueford's Favor on the Murder Charges 9

II. Given the Jury Instructions and Other Circumstances of This Case, the Hung Jury on Manslaughter Was an "Implied" Acquittal of Blueford on the Murder Charges. 17

III. The Collateral Estoppel Component of the Double Jeopardy Clause Also Bars Arkansas From Relitigating the Jury's Finding That Blueford Is Not Guilty of Murder 20

IV. After the Jury Had Announced That It Was "Unanimous Against" Conviction on the Murder Charges, No "Manifest Necessity" Justified the Mistrial on Those Charges 23

CONCLUSION 28

APPENDIX OF *AMICI CURIAE* 1a

TABLE OF AUTHORITIES

Page

CASES

Arizona v. Washington,
434 U.S. 497 (1978) 4-5, 25-28

Ashe v. Swenson,
397 U.S. 436 (1970) 1, 4, 21-22

Ball v. United States,
163 U.S. 662 (1896) 3, 11, 16

Burks v. United States,
437 U.S. 1 (1978) 17

Bushell's Case,
6 How. St. Tr. 999 (Common Pleas 1670) 2, 5, 15

CSX Transp., Inc. v. Hensley,
129 S. Ct. 2139 (2009) 20

Downum v. United States,
372 U.S. 734 (1963) 26-27

Gori v. United States,
367 U.S. 364 (1961) 27

Green v. United States,
355 U.S. 184 (1957) ..... *passim*

Greene v. Massey,
437 U.S. 19 (1978) 17

Harris v. Washington,
404 U.S. 55 (1971) 20-21

Illinois v. Somerville,
410 U.S. 458 (1973) 4, 23, 25, 27-28

In re Nielsen,
131 U.S. 176 (1889) 18

Ireland's Case,
7 How. St. Tr. 79 (1678) 26

Kepner v. United States,
195 U.S. 100 (1904) 16

People v. Richardson,
184 P.3d 755 (Colo. 2008) 9

Price v. Georgia,
398 U.S. 323 (1970) 3, 18-20

Renico v. Lett,
130 S. Ct. 1855 (2010) 4, 16, 23, 25

Richardson v. Marsh,
481 U.S. 200 (1987) 20

Sattazahn v. Pennsylvania,
537 U.S. 101 (2003) 19

Smith v. Massachusetts,
543 U.S. 462 (2005) 5, 10-14

State v. Castrillo,
566 P.2d 1146 (N.M. 1977) 8-9

State v. Pugliese,
422 A.2d 1319 (N.H. 1980) 8

State v. Tate,
773 A.2d 308 (Conn. 2001) 8, 20

Stone v. Superior Court,
646 P.2d 809 (Cal. 1982) 8, 11

Thompson v. United States,
155 U.S. 271 (1894) 23

Tibbs v. Florida,
457 U.S. 31 (1982) 10

Turner v. Arkansas,
407 U.S. 366 (1972) 22

United States v. DiFrancesco,
449 U.S. 117 (1980) 27

United States v. Dinitz,
424 U.S. 600 (1976) 27

United States v. Jorn,
400 U.S. 470 (1971) 24-25

United States v. Martin Linen Supply Co.,
430 U.S. 564 (1977) ..... *passim*

United States v. Perez,
22 U.S. (9 Wheat.) 579 (1824) 23

United States v. Scott,
437 U.S. 82 (1978) 9, 19

Wade v. Hunter,
336 U.S. 684 (1949) 23

Whiteaker v. State,
808 P.2d 270 (Alaska Ct. App. 1991) 8

Yeager v. United States,
129 S. Ct. 2360 (2009) 4, 22-23

CONSTITUTION, STATUTES, AND RULES

U.S. Const. amend. V ..... *passim*

U.S. Const. amend. XIV 1

OTHER AUTHORITIES

Note, *Acceptance of Partial Verdicts as a Safeguard Against Double Jeopardy*,
53 Fordham L. Rev. 889 (1985) 9

William Penn, *The Peoples Liberties Asssrted in the Tryal of William Penn and William Mead, 1670* 14-15

Theodore F.T. Plunknett, *A Concise History of the Common Law* (1956) 15-16

Restatement (Second) of Judgments (1982) 21

James A. Shellenberger & James A. Strazzella,
The Lesser Included Offenses Doctrine and the Constitution: The Development of Due Process and Double Jeopardy Remedies,
79 Marq. L. Rev. 1 (1995)..... 11

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Federal Practice and Procedure (2d ed. 2011)..... 21

INTEREST OF *AMICI CURIAE*[1]

Amici curiae are professors of criminal law and related disciplines who have studied, taught, written about, and litigated cases involving the Double Jeopardy Clause. *Amici* believe this case presents fundamental issues of double jeopardy law, and for that reason many of the *amici* joined in an earlier brief urging this Court to grant *certiorari*. The forewoman in this case announced in open court, in response to the judge's call for the jury's "count," that the jury had voted "unanimous against" convicting Alex Blueford on the capital and first-degree murder charges. Joint Appendix ["JA"] 64-65. Jeopardy on those charges terminated at that point, and the Fifth Amendment's Double Jeopardy Clause (incorporated through the Fourteenth Amendment) bars a second prosecution of Blueford on the same charges. "For whatever else that constitutional guarantee may embrace, . . . it surely protects a man who has been acquitted from having to 'run the gantlet' a second time" on the identical charges. *Ashe v. Swenson*, 397 U.S. 436, 445-46 (1970) (internal citations omitted). And what would the right to a trial by jury be worth if the judge could reject a verdict of acquittal pronounced in open court before that verdict had been reduced to a formal judgment "entered of record"?

The lead *amicus*, George C. Thomas III, is a Board of Governors Professor of Law and Judge Alexander P. Waugh, Sr. Distinguished Scholar at Rutgers School of Law—

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[1] The parties have consented to the filing of this brief; their written consents are on file with the Clerk. No counsel for a party authored this brief in whole or in part, and no party or counsel for a party made a monetary contribution intended to fund its preparation or submission. No person other than *amici* or their counsel made a monetary contribution to the preparation or submission of this brief.

Newark. He is the author of *Double Jeopardy: The History, the Law* (1998), and, with Joshua Dressler, of the casebook *Criminal Procedure: Principles, Policies and Perspectives* (4th ed. 2010). Professor Thomas and the undersigned Counsel of Record co-authored this brief.

A list of the other *amici* who reviewed and join in this brief is included in the attached Appendix. The views expressed herein are those of the individual *amici*, not of any institutions or groups with which they may be affiliated.

SUMMARY OF THE ARGUMENT

One of the enduring principles in this Court's double jeopardy jurisprudence is the protection of substantive judgments by a jury in favor of the accused. This noble principle tracks hard-won jury independence from British monarchs in the seventeenth century. Until *Bushel's Case* in 1670, judges felt free to ignore a jury's acquittal when the Crown wanted a conviction. The Framers' embrace of verdict protection in the Fifth Amendment's Double Jeopardy Clause has spared American defendants that kind of overt governmental interference with favorable jury decisions. But there are more subtle ways that a favorable jury outcome can be avoided or undermined.

In this case, Arkansas law permits a jury to consider a lesser-included offense only if it already has voted unanimously to acquit on all greater offenses. A colloquy between the judge and forewoman confirmed that the jury followed this rule. When the jury advised that it was deadlocked, the judge asked the forewoman for the jury's "count" on the capital and first-degree murder charges. She responded that the jury was "unanimous against" guilt on both charges. JA 64-65. This was a "ruling" in Blueford's favor "of some or all of the factual elements of the offense[s] charged." *United States v. Martin Linen Supply Co.*, 430 U.S. 564, 571 (1977). Such a ruling is an acquittal on the murder charges, and this Court repeatedly has emphasized

that substance governs over form and technicalities in determining when a defendant has been "acquitted." (Blueford has conceded that he remains subject to reprosecution on the lesser-included manslaughter and negligent homicide charges.)

What constitutes an "acquittal" for double jeopardy purposes is a federal question wholly independent of any state criteria for the entry of formal judgments "of record." This Court should therefore reverse the Arkansas Supreme Court's ruling that required formal "entry" of a written verdict before jeopardy terminated on the capital and first-degree murder charges. *See especially Ball v. United States*, 163 U.S. 662, 671 (1896) ("However it may be in England, in this country a verdict of acquittal, although not followed by any judgment, is a bar to a subsequent prosecution for the same offense.").

But even if the jury's oral verdict were not a "ruling" under *Martin Linen*, this Court has designed several doctrines that respond to more subtle attacks on favorable jury outcomes. *First*, this Court's double jeopardy decisions recognize "implied" acquittals—when the jury convicts on a lesser-included offense but is silent about guilt on a greater charge. In implied acquittal cases, no prosecution can proceed on the greater charge. *See Price v. Georgia*, 398 U.S. 323 (1970); *Green v. United States*, 355 U.S. 184 (1957). In Blueford's case, the jury was hung on the lesser offense of manslaughter, which should be treated the same for implied acquittal purposes as a conviction on a lesser offense. But Blueford's jury was far from silent on the greater charges, announcing that it was "unanimous against" guilt on both murder counts. If silence about guilt on a greater charge is an acquittal when the jury convicts of a lesser offense, it follows that an express "not guilty" of the greater charge plus a hung jury on the lesser must be treated as an acquittal on the greater charge as well.

Second, under the doctrine of defensive collateral estoppel embodied in the Double Jeopardy Clause, the State may not relitigate issues that the first jury necessarily determined in Blueford's favor. The State may not "hale [Blueford] before a new jury to litigate th[ose] issue[s] again." *Ashe v. Swenson*, 397 U.S. 436, 446 (1970); *see also Yeager v. United States*, 129 S. Ct. 2360, 2367-68 (2009) (facts "necessarily decided" by jury in voting to acquit on some counts were issue preclusive even though jury had deadlocked on other counts).

Third, under this Court's mistrial cases, a second prosecution on the murder charges is barred unless the mistrial on those charges was justified by "manifest necessity." At its irreducible minimum, the rule of "manifest necessity" requires a judge to consider potential alternatives to a mistrial and "to exercise the 'sound discretion' entrusted to him" in choosing among the alternatives. *Arizona v. Washington*, 434 U.S. 497, 510 n.28 (1978); *see also Renico v. Lett*, 130 S. Ct. 1855, 1863 (2010); *Illinois v. Somerville*, 410 U.S. 458, 469 (1973) (grant of mistrial must be "designed to implement a legitimate state policy"). There were, in Blueford's case, logical and easy alternatives to a mistrial—such as accepting the jury's report of the acquittal and undertaking the purely "ministerial" acts required to give formal effect to that ruling, *Ball*, 163 U.S. at 671, or providing verdict forms that would allow the jury to enter its verdicts on the two murder counts regardless of the outcome on the lesser-included charges. Under no stretch of the words "manifest" or "necessity" was the judge's mistrial ruling on the murder counts "manifestly necessary."

One recurrent theme in this Court's mistrial cases is that the State may not avoid an acquittal through a mistrial and then attempt to present a strengthened case a second time around—a practice this Court repeatedly has condemned as "'abhorrent,'" *Washington*, 434 U.S. at 508 (citation omitted), and that this brief will refer to as

"acquittal avoidance."[2] *Washington* noted that one of the purposes of the Double Jeopardy Clause was to guard against the practice of English judges "exercising a power to discharge a jury whenever it appeared that the Crown's evidence would be insufficient to convict." *Id.* at 507. Here it not only "appeared" that the State's evidence was weak, the jury declared in open court that it was "unanimous against" conviction on the capital and first-degree murder charges.

Taken together, the "implied" acquittal cases, defensive collateral estoppel cases, and mistrial cases stand for a fundamental principle that follows from *Bushel's Case*: Substantive outcomes of criminal trials that favor the accused should be treated as an acquittal. A recent application of that principle appears in *Smith v. Massachusetts*, 543 U.S. 462 (2005), where the trial court granted a mid-trial acquittal on one charge and then changed its mind before the case was submitted to the jury. Even though no additional proceedings would have been necessary to allow the jury to deliberate on the dismissed charge, the Court held that the mid-trial acquittal terminated jeopardy on that particular count. *Id.* at 467-75. This acquittal-protection principle applies with even greater force in this case, where Blueford is being subjected to a *second* full prosecution that would be tried to a *second* jury on the identical charges that the first jury was "*unanimous against.*"

ARGUMENT

This case presents several core double jeopardy issues in stark and unambiguous terms. Blueford's jury was instructed that it could not even "consider" lesser-included

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[2] *See* George C. Thomas III, *Double Jeopardy: The History, the Law* 230 (1998) (discussing need for a mistrial doctrine that discourages "using early trial termination as acquittal avoidance"); *see also id.* at 237-46.

charges unless and until it had *unanimously* determined that the State had failed to "sustain" the capital and first-degree murder charges—that is, only "[i]f you have a reasonable doubt of the defendant's guilt" on those greater charges. Instructions 12-15, JA 51-52. The State relied heavily on these instructions in closing argument:

> "[W]hat's important for you to understand is that before you can consider a lesser included of capital murder, you must first, all 12, vote that this man is not guilty of capital murder before you can ever move on to the lesser included offenses. As the Judge indicated to you, there is a lesser included offense of murder in the first degree. . . . But like I said before, you don't even get to this instruction until all 12 of you are able to vote that you do not believe this man is guilty of capital murder, and we submit to you that he is. There is a lesser after murder in the first degree, so if you all 12 vote that he is not guilty of murder in the first degree, then there is manslaughter." JA 55 (paragraph breaks omitted).

After defense counsel's closing argument, the State returned to the need for a unanimous acquittal on the murder charges before lesser-included charges could even be considered:

> "It's not a situation where you just lay everything out here and say, well, we have four choices. Which one does it fit the most? . . . [U]nless all 12 of you agree that this man's actions were not consistent with capital murder, then and only then would you go down to murder in the first degree." *Id.* at 59.

The jury squarely rejected the capital and first-degree murder charges on the merits. The jurors voted unanimously, to borrow from the State's language, that they "d[id] not believe this man is guilty" of murder and that "this man's actions were not consistent with capital murder" or first-degree murder. *Id.* at 55, 59. Although they voted to acquit Blueford on these charges, they deadlocked 9-3 on the manslaughter charge. The court then directed the forewoman to report the jury's "count" on each charge in open court. *Id.* at 64. As for capital murder, the forewoman announced the jury "was unanimous against that. No." *Id.* As for first-degree murder, the forewoman announced that the jury "was unanimous against that" too. *Id.* at 65. The forewoman then reported the jury was deadlocked on manslaughter and had not yet considered negligent homicide. *See id.* She emphasized that the jury had not considered the latter count because "[w]e couldn't get past the manslaughter," and the jurors understood, pursuant to the judge's instructions, that they were not to consider lesser offenses unless and until they had acquitted on the greater ones—they "were supposed to go one at a time." *Id.*

The court ordered the jury to resume its deliberations. *Id.* at 65-67. Blueford's counsel then moved "that the jury be given verdict forms and that they fill out verdict forms for those counts that they have reached a verdict on"—capital and first-degree murder. *Id.* at 67.[3] The court denied that

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[3] The jurors had been given verdict forms, but those forms did not allow the jurors to return an express verdict of "not guilty" unless they found Blueford innocent on *all four* counts. Specifically, immediately before the jurors retired to deliberate, the judge gave them four "guilty" verdict forms—one for each of the charges—and a fifth form declaring that "[w]e, the Jury, find Alex Blueford not guilty of a homicide offense," *i.e.*, of *any* of the four charges. JA 60. The jurors were instructed to choose from among these five verdict forms, and to have the foreperson sign and return the form they chose. *Id.* Thus, when defense counsel

motion and, after the jury was unable to resolve its impasse over the manslaughter count, declared a mistrial—not only as to the lesser offenses, but on the capital and first-degree murder counts as well. *Id.* at 69-70.

Arkansas is now seeking to retry Blueford for murder all over again, despite the first jury being "unanimous against" convicting him of that crime. On interlocutory appeal, the Arkansas Supreme Court held that the State could retry Blueford for capital and first-degree murder because "neither the giving of those instructions nor the forewoman's announcement in open court that the jury found Appellant not guilty on those two charges negates the bedrock principle of law that a judgment is not valid until entered of record." Pet. App. 10a. Because the jurors' unanimous vote was never reduced to a written judgment "entered of record," it was "axiomatic" that the jurors' decision was a nullity and did not terminate Blueford's jeopardy. *Id.* at 9a-10a.

The Arkansas Supreme Court acknowledged that "[j]urisdictions are split on the issue of partial verdicts," and that many state courts and legislatures have decided "that double jeopardy requires a partial verdict of acquittal as to the greater offenses if the jury is deadlocked only as to the lesser offenses." *Id.* at 12a-13a.[4] But the court was "simply

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asked "that the jury be given verdict forms," she was asking for forms that would allow the jury to record its acquittals on the murder charges irrespective of the resolution of the lesser-included offenses. *Id.* at 67. The State objected, and the court denied the defense motion. *Id.* at 68.

[4] The Arkansas Supreme Court cited to *Whiteaker v. State*, 808 P.2d 270, 273-78 (Alaska Ct. App. 1991); *Stone v. Superior Court*, 646 P.2d 809, 816-17 (Cal. 1982); *State v. Tate*, 773 A.2d 308, 319-25 (Conn. 2001); and *State v. Pugliese*, 422 A.2d 1319, 1320-22 (N.H. 1980) (per curiam). *See also State v. Castrillo*, 566 P.2d 1146, 1151-52 (N.M. 1977); *People v. Richardson*, 184 P.3d 755, 766 (Colo. 2008) (Martinez, J., dissenting) (discussing

unpersuaded by the underlying rationale" of this position, and declined to depart from the "bedrock principle" of Arkansas jurisprudence requiring a formal judgment "entered of record" before jeopardy terminates. *Id.* at 10a, 13a.

The judgment of the Arkansas Supreme Court conflicts with this Court's double jeopardy decisions in at least four fundamental respects: it conflicts with this Court's acquittal decisions, its implied acquittal decisions, its collateral estoppel decisions, and its mistrial decisions. We examine each conflict in turn.

I. THE JURY'S PRONOUNCEMENT IN OPEN COURT WAS A SUBSTANTIVE RULING IN BLUEFORD'S FAVOR ON THE MURDER CHARGES.

"[T]he law attaches particular significance to an acquittal." *United States v. Scott*, 437 U.S. 82, 91 (1978). It is a "deeply entrenched principle of our criminal law that once a person has been acquitted of an offense he cannot be prosecuted again on the same charge." *Green v. United States*, 355 U.S. 184, 192 (1957). Although a defendant may be retried in many instances after avoiding a conviction or obtaining a reversal on appeal, that is not the case after an

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caselaw in fourteen states requiring acceptance of partial verdicts). Other states have adopted, either through legislation or rulemaking, procedures that allow for judgments of partial acquittal in cases like these. *See, e.g.*, *Richardson*, 184 P.3d at 763 n.6 (en banc) (discussing states with "rules of criminal procedure that expressly require trial courts to poll deadlocked juries and accept partial verdicts"); *id.* at 766 (Martinez, J., dissenting) (discussing states that have "incorporated" this safeguard "into their rules, statutes, and jury instructions"); *see also* Note, *Acceptance of Partial Verdicts as a Safeguard Against Double Jeopardy*, 53 Fordham L. Rev. 889, 890 n.6 (1985).

"acquittal," which "terminates" jeopardy and bars any further jeopardy on the same charges. *Id.*

This Court has long held that what constitutes an "acquittal" is a matter of substance, not form:

> "[W]e have emphasized that what constitutes an 'acquittal' is not to be controlled by the form of the judge's action. Rather, we must determine whether the ruling of the judge, whatever its label, actually represents a resolution, correct or not, of some or all of the factual elements of the offense charged." *United States v. Martin Linen Supply Co.*, 430 U.S. 564, 571 (1977) (internal citations omitted).

Though *Martin Linen* involved a ruling by a judge, the principle applies equally to jury acquittals. Thus, regardless of "nomenclature" or whether other counts remain pending, a defendant is "acquitted" on a count whenever there has been "a *substantive determination* that the prosecution has failed to carry its burden," whether through "an acquittal by jury verdict" or "a court-decreed acquittal." *Smith v. Massachusetts*, 543 U.S. 462, 467-69 (2005) (emphasis added); *see also Tibbs v. Florida*, 457 U.S. 31, 41 (1982) ("A verdict of not guilty, whether rendered by the jury or directed by the trial judge, absolutely shields the defendant from retrial."). Jeopardy terminates in these circumstances whether or not there has been a "formal" verdict or entry of judgment. What matters is whether there has been an acquittal or "acquittal equivalent"—a *substantive determination* "that resolves the blameworthiness issue in favor of the defendant."[5]

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[5] Thomas, *Double Jeopardy*, n.2 *supra*, at 230-31; *see id.* at 229-50 (reviewing precedents demonstrating that a formal verdict is not necessary to bar a second trial when the first trial has

These principles are at their zenith where, as here, the constitutional right to a trial by jury is at stake. The right against successive prosecutions is intimately connected to the right to a jury trial. What would a jury trial be worth if the judge could reject a verdict announced in open court but not yet "entered of record," which is supposed to be a purely "ministerial act, involving no judicial discretion"? *Ball v. United States*, 163 U.S. 662, 671 (1896).

The Blueford jury's pronouncement in open court, in response to the judge's call for its "count," that it was "unanimous against" capital and first-degree murder was an acquittal or, at the very least, the equivalent of an acquittal for double jeopardy purposes on those charges. (Blueford concedes that he may be retried on the lesser-included manslaughter and negligent homicide charges.) The jury's action represented "a substantive determination" by the jury "that the prosecution ha[d] failed to carry its burden" on these charges. *Smith*, 543 U.S. at 468. The jury forewoman's response resolved in Blueford's favor "some or all of the factual elements of the offense[s] charged." *Martin Linen*, 430 U.S. at 571. There was nothing ambiguous or tentative about the jury's "substantive determination" of Blueford's innocence on the murder charges, and no reason to believe the jury might change its mind. The judge's instructions, prosecutor's closing argument, and judge's

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resolved blameworthiness in favor of the defendant); *see also Stone*, 646 P.2d at 814 ("It is plain . . . that if we recognize the jury's actions to be the equivalent of an acquittal of murder, defendant cannot be retried for either degree of that offense."); James A. Shellenberger & James A. Strazzella, *The Lesser Included Offense Doctrine and the Constitution: The Development of Due Process and Double Jeopardy Remedies*, 79 Marq. L. Rev. 1, 160 (1995) ("Ultimately, an action will be treated as an acquittal if the substance of that action measures up to the definition of an acquittal, no matter what the acquitting action may be labeled in the trial court record.").

colloquy with the forewoman all made clear that the jury understood that it had to decide unanimously to acquit Blueford of the greater offenses before considering the lesser-included ones. *See* pp. 5-7 *supra*. Thus, the jury's substantive determination of Blueford's innocence on the murder charges was a *Martin Linen* ruling in his favor.

Consider several variations on the *Blueford* facts that underscore why the jury's action in this case must be construed as operating to terminate jeopardy on the capital and first-degree murder counts. Suppose the jury forewoman had announced that the jury was "unanimous against" all four counts, and the judge angrily ordered that the jurors be held in confinement until they changed their minds. Or, to pose a less extreme variation, suppose the jurors forgot to fill out the verdict form, or failed to complete the form because it was confusingly worded. But the forewoman announced in open court that the jury was "unanimous against" conviction on *all* charges. At this point the judge engaged in "acquittal avoidance"—he declared a mistrial because he was convinced the defendant was guilty and that the prosecution should have another shot at conviction, having learned from its mistakes in the first trial. Or, to offer one more variation, suppose the jury properly filled in the verdict form and delivered it to the judge, who, appalled by the outcome, promptly tore the verdict form in half and threw it away rather than having it "entered of record" and instead declared a mistrial. Finally, suppose that the judge and clerk simply forgot to take the ministerial steps necessary to make the verdict formally "of record."

We cannot imagine a persuasive argument that any of these scenarios would be anything other than a "substantive determination" by the jury in the defendant's favor "of some or all of the factual elements of the offense charged." *Smith*, 543 U.S. at 468; *Martin Linen*, 430 U.S. at 571. Can it be true that the lack of a fully completed verdict form, the apparent refusal of the judge to accept the jury's acquittals,

or a simple ministerial error would render any of these jury actions any less a "ruling" on the substantive merits in the defendant's favor? The jury's substantive ruling in Blueford's case is not different in any material way from these variations.

Smith v. Massachusetts further supports treating the jury's actions here as an "acquittal" or the equivalent thereof. After the prosecution rested in that case, the defense moved for acquittal on the firearm-possession count of a multi-count indictment. The trial court orally "granted the motion. . . . and the allowance of the motion was entered on the docket." 543 U.S. at 465. At the close of the trial, but before the case was submitted to the jury for its determination, the prosecutor asked the court to reverse its ruling on the motion for acquittal. The court agreed and "allow[ed] the firearm-possession count to go to the jury." *Id.*

This Court held that the mid-trial ruling was an "acquittal" even though trial had continued on other counts. "It is of no moment that jeopardy continued on the two assault charges, for which the jury remained empanelled. Double-jeopardy analysis focuses on the individual 'offence' charged, and our cases establish that *jeopardy may terminate on some counts even as it continues on others*." *Id.* at 469 n.3 (emphasis added, citations omitted).

Blueford also prevails under the analysis of the four Justices who dissented in *Smith*. The *Smith* dissenters reasoned that Smith had "suffered no prejudice fairly attributable to" the reversal of the mid-trial bench dismissal because he was not exposed to "*further* trial proceedings"; the dismissal of the charge followed by its reinstatement occurred during the course of "a *single, unbroken trial proceeding*" that all took place before "the court of *first* instance." 543 U S. at 476-80 (Ginsburg, J., dissenting) (emphasis added); *see also id.* at 479 ("the jury remained seated with no break in the trial"). Here, on the other hand,

Blueford is being subjected *precisely* to the core evil that the Double Jeopardy Clause was intended to prohibit: a *second* prosecution to a *second* jury after the *first* jury had voted to acquit on the murder charges.

The *Smith* dissenters emphasized that the trial court's reversal of its mid-trial dismissal did not give the prosecution a second opportunity to prove a claim it already had failed to prove, because (as the Appeals Court of Massachusetts had found) "the Commonwealth's evidence presented before the [motion to dismiss] was made and granted, in fact, sufficed to prove every element of the firearm possession charge." *Id.* at 479 (Ginsburg, J., dissenting). Thus there was no reason to believe that acquittal avoidance might be afoot. Here, on the other hand, we know the State's evidence to the first jury was insufficient to convict of murder because that is what the jury decided and announced. And for good reason: as amply documented in the trial record, the prosecution's circumstantial murder case was riddled with flaws, flouted the medical evidence and elementary principles of forensic pathology, and fell apart at trial. *See* Pet. Br. 3-8, 16. Thus, unlike the situation in *Smith*, the prosecution here is seeking to try Blueford a *second* time, having learned from its errors and omissions the first time around—something the Double Jeopardy Clause clearly prohibits. *See* pp. 25-28 *infra*. The judgment by the jury that Blueford is not guilty of capital or first-degree murder should be respected as the acquittal it is.

History supports the argument that the judge cannot engage in acquittal avoidance, but must accept an acquittal with which he does not agree. In *William Penn's Case* in 1670, the judge refused to accept the jury's not guilty verdict and even threatened to cut the throat of the jury foreman. The judge also had Penn chained to the floor when he argued that the refusal to accept the jury verdict denied him "Justice." The judge ordered the jury locked up for two days "without Meat, Drink, Fire, and Tobacco," but the jury clung

to its not guilty verdict. The judge ultimately accepted the acquittal but ordered the jurors imprisoned until they paid a harsh fine. See William Penn, *The Peoples Liberties Asssrted in the Tryal of William Penn and William Mead, 1670.*

The jury foreman, Bushell, petitioned for a writ of habeas corpus. In *Bushell's Case*, 6 How. St. Tr. 999 (Common Pleas 1670), the ten judges on the Court of Common Pleas unanimously held that a trial court lacked the authority to punish the jury on account of its verdict. Today, *Bushell's Case* is regarded as a watershed case that established the jury's independence from the court and thus elevated jury trial to a fundamental right. While this is true enough, it misses the deeper point, which is *why* a jury verdict of acquittal cannot be impeached. Chief Justice Vaughan's opinion noted that if judges could tell the jury how to decide a case, there would be no point in having juries at all. Vaughan could have stopped there but he made another, more fundamental, point: a jury finding that the evidence is not "full and manifest" is unimpeachable *because it is true*. *Id.* at 1006. Just as two barristers could "deduce contrary and opposite conclusions out of the same case in law . . . two men [could] infer distinct conclusions from the same testimony," and thus no reason exists to prefer the court's view over the jury's. *Id.*[6]

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[6] For an earlier example, consider the fate of the London jury that acquitted Sir Nicolas Throckmorton of high treason. The jurors were "called into the Star Chamber in October, [1554], forasmuch as the matter was held to have been sufficiently proved against [Throckmorton]; and eight of them were there fined in great sums, at least five hundred pounds each, and remanded back to prison to dwell there until further order were taken for their punishment. The other four were released, because they submitted and confessed that they had offended in not considering the truth of the matter." Theodore F.T. Plunknett, *A Concise History of the*

Contrary to the State's subsequent characterizations, what happened in court in Blueford's case was in no sense an "informal exchange[]" or "discussion." Opp. to Pet. Cert. at 6, 9. The forewoman was responding on behalf of the jury, in open court on the formal record, to the judge's call for the jury's "count" on the issue of Blueford's guilt or innocence. Chief Justice Vaughn would have said that the forewoman's response represented the *truth* about Blueford's guilt on the murder charges. It did not matter that a verdict form was not filled in or judgment "entered of record." The term "verdict," derived from the Latin *veredictum*, means literally to say or speak the truth, not to write it down. As this Court long ago emphasized, "[h]owever it may be in England, in this country a verdict of acquittal, although not followed by any judgment, is a bar to a subsequent prosecution for the same offense." *Ball*, 163 U.S. at 671; *see also id.* ("the reception of the verdict and discharge of the jury is but a ministerial act, involving no judicial discretion"); *Kepner v. United States*, 195 U.S. 100, 130 (1904) (same). The trial judge lacked the authority at that point to ignore the jury's acquittals by declaring a mistrial. *See also* Part IV *infra*.[7]

Common Law 133 (5th ed. 1956) (quoting from 1594 treatise) (internal punctuation and footnote omitted) (citing additional examples).

[7] This case does not present a situation in which the trial court in the first case took pains to prevent the jury from disclosing any of its deliberations or votes on the various charges—a relevant, though not dispositive, factor. Compare *Renico v. Lett*, 130 S. Ct. 1855 (2010), allowing a retrial after a mistrial where the trial court had told the deadlocked jury that "I don't want to know what your verdict might be, or how the split is, or any of that. Thank you. Okay?" *Id.* at 1861. Here the trial court questioned the forewoman on the jury's "count." Moreover, the effect of so-called "hard transition" instructions was not at issue in *Renico*. *See* Part II *infra*.

II. GIVEN THE JURY INSTRUCTIONS AND OTHER CIRCUMSTANCES OF THIS CASE, THE HUNG JURY ON MANSLAUGHTER WAS AN "IMPLIED" ACQUITTAL OF BLUEFORD ON THE MURDER CHARGES.

This Court's double jeopardy cases repeatedly have emphasized that a ruling that amounts to an acquittal must be treated as such even though no verdict form (let alone one that had been reduced to a formal judgment "entered of record") showed the words "not guilty." In *Burks v. United States*, 437 U.S. 1 (1978), for example, the jury convicted, the judge refused to grant a new trial on the ground of insufficient evidence, and Burks appealed. The Court of Appeals agreed with Burks that the evidence was insufficient to convict and remanded to the district court to determine whether to order a new trial or enter an acquittal.

In a unanimous opinion by Chief Justice Burger (Justice Blackmun not participating), this Court held that the Double Jeopardy Clause precluded a new trial. Relying in part on *Martin Linen*, the Court held that the Court of Appeals' judgment was "a resolution, correct or not, of some or all of the factual elements of the offense charged." *Id.* at 10. "The Double Jeopardy Clause forbids a second trial for the purpose of affording the prosecution another opportunity to supply evidence which it failed to muster in the first proceeding. This is central to the objective of the prohibition against successive trials." *Id.* at 11. Even though no jury form stated "not guilty," the Court looked to the *substance* of what had happened and refused to let the State have another bite at the apple. *See also Greene v. Massey*, 437 U.S. 19, 26 (1978) (retrial barred where "the legally competent evidence adduced at the first trial was insufficient to prove guilt") (emphasis omitted).

Burks also relied, in part, on *Green v. United States*, 355 U.S. 184 (1957), another case without a completed "not

guilty" verdict form. Green was charged with arson and first-degree murder. The judge instructed the jury that it could find Green guilty of second-degree murder as a necessarily included offense of first-degree murder. The jury returned a guilty verdict of second-degree murder and arson, but "[i]ts verdict was silent" on the first-degree murder charge. *Id.* at 186. After Green's convictions were reversed on appeal, the government sought to try him again for first-degree murder. This Court held that another trial on that charge would violate the Double Jeopardy Clause:

> "Green was in direct peril of being convicted and punished for first degree murder at his first trial. He was forced to run the gantlet once on that charge and the jury refused to convict him. When given the choice between finding him guilty of either first or second degree murder it chose the latter." *Id.* at 190.

This Court re-affirmed and strengthened *Green* in *Price v. Georgia*, 398 U.S. 323 (1970), which unanimously held that a conviction of a lesser-included offense, manslaughter, barred a second trial for the greater offense, murder. As in *Green*, the jury verdict was silent on the greater offense. *Price* emphasized that the silence on the greater charge was irrelevant: "[T]his Court has consistently refused to rule that jeopardy for an offense continues after an acquittal, ***whether that acquittal is express or implied*** by a conviction on a lesser included offense when the jury was given a full opportunity to return a verdict on the greater charge." *Id.* at 329 (emphasis added); ***see also In re Nielsen***, 131 U.S. 176, 190 (1889) ("If a conviction might have been had, and was not, there was an implied acquittal.").

Blueford's case is even more compelling than *Green* or *Price*. Rather than "implied" innocence through jury silence on the greater charge, here the jury forewoman announced that the jury "was unanimous against" both

capital and first-degree murder. Rather than an *implicit* "refus[al] to convict," *Green*, 355 U.S. at 190, here the jury was *explicit* in its refusal. But if that declaration is ignored, Blueford's case is indistinguishable from *Green* and *Price*. The Blueford jury, like the jury in *Price*, had a "full opportunity to return a verdict on the greater charge," *id.*, and determined, in the words of the jury instructions, that the State had failed to "sustain" those charges and that "reasonable doubt" remained, JA 51-52. To borrow from the prosecution's characterization of these instructions, the jury determined "that this man is not guilty of capital murder" and "is not guilty of murder in the first degree." *Id.* at 55. Because a jury already has "refused to convict" on these charges, *Green*, 355 U.S. at 190, the Double Jeopardy Clause bars a retrial on either capital or first-degree murder.[8]

This conclusion is reinforced by the Arkansas procedure on jury deliberation. Unlike the practice in Arkansas, juries in some states are instructed that they may move back and forth between the issues and varying degrees of guilt until they have agreed upon an outcome. The issues in "soft transition" states like these may be different and more difficult than in "hard transition" states like Arkansas, where the jury is required to find the defendant not guilty of

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[8] The "implied acquittal" principle of *Green* and *Price* can usefully be contrasted with other determinations that do not trigger double jeopardy protection. In *Sattazahn v. Pennsylvania*, 537 U.S. 101 (2003), for example, the Court stressed that "the touchstone for double-jeopardy protection . . . is whether there has been an 'acquittal'"—a resolution of "guilt or innocence." *Id.* at 106, 109. Under this standard, a life sentence for capital murder did *not* constitute an "acquittal" that barred subsequent resentencing to death for the convicted offense. *Id.* at 109-10. *See also United States v. Scott*, 437 U.S. 82, 94-101 (1978) (defense-requested dismissal on the ground of pre-indictment delay is not equivalent to an "acquittal" and thus not a jeopardy bar to a new indictment).

the greater offenses before being allowed to consider lesser-included charges. *See, e.g.*, *State v. Tate*, 773 A.2d 308, 321-22 (Conn. 2001) (concerns about "tentative nature" of jury's decisions in "soft transition" states "do not surface" in hard-transition states, which "require[] the jury to reach a partial verdict" on the greater charges before turning to the lesser-included offenses).

But where a jury has expressly been instructed that it may consider lesser-included offenses only if it has first unanimously determined that the State has failed to "sustain" its burden of proof on the greater offenses, *see* JA 51, the very fact of jury deliberation on a lesser-included offense makes the case equivalent to a conviction of a lesser-included offense as in *Green* and *Price*. *See also CSX Transp., Inc. v. Hensley*, 129 S. Ct. 2139, 2141 (2009) (per curiam) ("[J]uries are presumed to follow the court's instructions."); *Richardson v. Marsh*, 481 U.S. 200, 206-07 (1987) (reviewing "the almost invariable assumption of the law that jurors follow their instructions") (citations omitted). The effect of Arkansas law is to make a hung jury on a lesser included offense, without more, a substantive acquittal on the greater charges.

III. THE COLLATERAL ESTOPPEL COMPONENT OF THE DOUBLE JEOPARDY CLAUSE ALSO BARS ARKANSAS FROM RELITIGATING THE JURY'S FINDING THAT BLUEFORD IS NOT GUILTY OF MURDER.

Because the jury's action constituted an acquittal of Blueford on the capital and first-degree murder charges, the State's reprosecution of Blueford on those charges also is barred under the doctrine of defensive collateral estoppel. "[C]ollateral estoppel in criminal trials is an integral part of

the protection against double jeopardy[.]" *Harris v. Washington*, 404 U.S. 55, 56 (1971) (per curiam).[9]

In *Ashe v. Swenson*, 397 U.S. 436 (1970), several masked men robbed six poker players. Ashe was charged with robbing one player, and the jury acquitted him. This Court held the acquittal barred a trial for the robbery of another poker player. The Court conceded that the robbery of each player was a different offense, but Ashe had argued in the first trial that he had no connection to the robbery. Thus, when the jury acquitted, it necessarily found that Ashe had not been one of the robbers—a fact critical to culpability that the State would try to prove again in a second trial. The question, this Court said, was "whether, after a jury determined by its verdict that the petitioner was not one of the robbers, the State could constitutionally hale him before a new jury to litigate that issue again." *Id.* at 446. The answer was "no."

Blueford makes an even more compelling collateral estoppel argument, because he is being reprosecuted not simply for a related offense involving common facts, but for the *identical* offense. Notice that Ashe, like Blueford, lacked a formal verdict of not guilty on the pending charge. What

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[9] Just as the existence of an "acquittal" does not turn on formalities, neither does the application of collateral estoppel. What matters is whether a factual determination is "sufficiently firm to be accorded conclusive effect," even if not included in a formal, final judgment. Restatement (Second) of Judgments § 13 (1982); *see also id.*, cmt. *g* ("In particular circumstances the wisest course is to regard the prior decision of the issue as final for the purpose of issue preclusion without awaiting the end judgment. . . . [T]he court should determine that the decision to be carried over was adequately deliberated and firm, even if not final in the sense of forming a basis for a judgment already entered."); 18A Charles Alan Wright *et al.*, *Federal Practice and Procedure* § 4434 (2d ed. 2011) ("practical finality").

Ashe had was a *finding* by a jury that he was not one of the robbers. What Blueford has here is a *finding* by the jury that the State did not prove the facts necessary to convict on either capital or first-degree murder. The State may not "hale him before a new jury to litigate that issue again." *Id.*; *see also Turner v. Arkansas*, 407 U.S. 366, 369 (1972) (jury's general acquittal of murder implicitly but "logical[ly]" determined that defendant had not been "present at the scene of the murder and robbery"; collateral estoppel prevented subsequent prosecution on any charge dependent on defendant's presence at the scene).

That the State properly got a mistrial on the lesser counts changes nothing in the collateral estoppel calculus, as demonstrated in *Yeager v. United States*, 129 S. Ct. 2360 (2009). There the Court held that an acquittal on some counts necessarily resolved certain facts in Yeager's favor on counts where the jury was hung. That some counts were hung made no difference in the analysis of the collateral estoppel effects of the *acquitted* counts; "a jury verdict that necessarily decided [a particular] issue in [defendant's] favor protects him from reprosecution for any charge for which that is an essential element." *Id.* at 2368-69.

Although the dissenting Justices in *Yeager* disagreed with the Court that the acquittals necessarily resolved the hung counts in the defendant's favor, *see id.* at 2374-75 (Alito, J., dissenting), no one suggested that Yeager could be retried on the *acquitted* counts. Yet that is what the State seeks to do in Blueford's case. Under *Yeager*, the mistrial on the manslaughter count in Blueford's case is irrelevant to the collateral estoppel effects of the jury's unanimous determination that he is not guilty of murder. The Arkansas courts treated the mistrial as the event that determines whether the acquittals are valid, precisely the opposite of what *Yeager* requires. The facts underlying capital and first-degree murder have been "necessarily decided" in Blueford's

favor, *id.* at 2366, and the Double Jeopardy Clause forbids re-litigating them.

IV. AFTER THE JURY HAD ANNOUNCED THAT IT WAS "UNANIMOUS AGAINST" CONVICTION ON THE MURDER CHARGES, NO "MANIFEST NECESSITY" JUSTIFIED THE MISTRIAL ON THOSE CHARGES.

Green relied on another rationale, in addition to implied acquittal, for holding that a retrial for first-degree murder was barred by the Double Jeopardy Clause after conviction of a lesser-included offense—that "the jury was dismissed without returning any express verdict on that charge and without Green's consent." 355 U.S. at 191. To be sure, mistrials based on hung juries are a long-established exception permitting the State to re-prosecute when the first jury has had a chance to reach consensus but failed to do so. *See Renico v. Lett*, 130 S. Ct. 1855, 1863-64 (2010); *United States v. Perez*, 22 U.S. (9 Wheat.) 579, 580 (1824). Blueford does not dispute that the mistrial on the lesser charges permits retrial on them.

Justice Story's opinion in *Perez* coined the term "manifest necessity" to explain why a retrial is ordinarily permissible after a hung jury. *Id.* One characteristic marks all of this Court's manifest necessity cases—no good alternative existed to a mistrial. This is obviously the case when the jury is hung. It also explains cases such as *Illinois v. Somerville*, 410 U.S. 458, 468-70 (1973) (fatally flawed indictment could not be remedied by amendment); *Wade v. Hunter*, 336 U.S. 684, 691 (1949) ("tactical situation brought about by a rapidly advancing army" into Germany made it impracticable to obtain necessary witnesses); and *Thompson v. United States*, 155 U.S. 271, 273-74 (1894) (juror discovered to be disqualified after trial began).

But in Blueford's case, the judge had readily available and logical alternatives to granting mistrial on the

murder charges. He simply could have accepted the verdict the jury announced in open court. Or he could have adopted the alternative that Blueford's counsel specifically requested and that is widely used throughout the country (*see* n.4 *supra*): The judge could have provided the jurors with a verdict form that enabled them to return a verdict of guilty or not guilty on the greater charges regardless of whether they could agree on manslaughter or negligent homicide. As defense counsel emphasized, "we also have an obligation to move forward where we can. And we're looking at, at least on the Defense side, expenditures of $10,000 or more at repeating this at a capital murder rate. And if the jury is decisive about the capital murder and the murder one, we would want those verdict forms submitted to them. That is our request." JA 68.

Indeed, the State's principal argument in this case has a fundamental contradiction at its core: If the State is correct that the jury's pronouncement in open court was not a cognizable "verdict" on the murder charges, the mistrial cases required the judge to provide the jury an opportunity to return a verdict on those charges. Once given such an opportunity, the jury might have acquitted, convicted, or deadlocked on the murder charges. But *any* of these outcomes would have avoided the second prosecution on the murder charges and the interlocutory appeal that has reached this Court.

This aspect of the case is governed by *United States v. Jorn*, 400 U.S. 470 (1971), where six members of the Court held that Jorn could not be retried after the trial judge had aborted the trial on his own motion without considering other alternatives to a mistrial. Writing for four members of the Court, Justice Harlan concluded that manifest necessity was not present because the judge had given "no consideration" to possible alternatives to a mistrial and "made no effort to exercise a sound discretion to assure that, taking all the circumstances into account, there was a

manifest necessity for the *sua sponte* declaration of this mistrial." *Id.* at 487.[10] Although a judge has broad discretion in considering the options, he must actually "exercise the 'sound discretion' entrusted to him" in evaluating those options "[]rationally" and "[]responsibly." *Arizona v. Washington*, 434 U.S. 497, 510 n.28, 514 (1978); *see also Renico v. Lett*, 130 S. Ct. at 1863; *Illinois v. Somerville*, 410 U.S. at 469 (court's declaration of a mistrial must reflect "a rational determination designed to implement a legitimate state policy"); *id.* at 468, 471.

The judge in this case could have allowed the jury to return a more "formal" verdict on the murder charges than it already had announced. How did the judge exercise his discretion in evaluating the alternatives to a mistrial? He said, "Well, it's—it's—it's like changing horses in the middle of the stream. I mean, we have submitted the instructions and the verdict forms. And to go back and then change that at this time, frankly, would create a mistrial within itself and that would not be appropriate." JA 68. But as discussed in note 3 *supra*, the forms the jury had been given did not permit a not guilty verdict solely on the murder charges. Until the jury was given such an opportunity, there was no necessity, "manifest" or otherwise, to grant a mistrial on the murder charges. And if the amended instructions and verdict forms *had* been given to the jury at Blueford's request, surely he could not then have complained and demanded a mistrial.

Blueford has an even more compelling argument than Jorn that a mistrial triggers a jeopardy bar. In *Arizona v. Washington*, this Court interpreted its "manifest necessity"

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[10] Two other members of the *Jorn* Court would have held that the judge's discharge was an acquittal. *Id.* at 488 (Black and Brennan, JJ., joining in the judgment). Thus, a majority of six Justices in *Jorn* viewed the failure to consider alternatives to a mistrial as a bar to a second trial.

precedents as establishing "that there are degrees of necessity and we require a 'high degree' before concluding that a mistrial is appropriate." 434 U.S. at 506. The "degrees of necessity" are on a spectrum:

> "At one extreme are cases in which a prosecutor requests a mistrial in order to buttress weaknesses in his evidence. Although there was a time when English judges served the Stuart monarchs by exercising a power to discharge a jury whenever it appeared that the Crown's evidence would be insufficient to convict, the prohibition against double jeopardy as it evolved in this country was plainly intended to condemn this 'abhorrent' practice." *Id.* at 507-08 (citation omitted).

A particularly vivid example of "acquittal avoidance" under the Stuart monarchs is *Ireland's Case*, 7 How. St. Tr. 79 (1678). Five defendants were tried for conspiring to murder Charles II. At the close of the evidence, the judge advised the jury that the Crown had presented insufficient evidence to sustain the charges against two of the defendants. But instead of dismissing the charges or allowing the jury to acquit these defendants, the judge returned them to prison "until more proof may come in." *Id.* at 120. They were later retried, convicted, and executed; their plea of double jeopardy was rejected "because there was no condemnation or acquittal" of them in the first trial. *Id.* at 316-17. *Ireland's Case* is a classic, and overt, example of acquittal avoidance.

This Court repeatedly has condemned the practice of acquittal avoidance, emphasizing that it can never provide the "manifest necessity" needed to end the first trial in a way that justifies a new trial on the same charges. In *Downum v. United States*, 372 U.S. 734 (1963), for example, the

prosecutor announced he was ready for trial even though his key witness had not been located. The Court characterized the need for a mistrial as based on the decision of the district attorney to "enter[] upon the trial of the case without sufficient evidence to convict." *Id.* at 737. *See also United States v. DiFrancesco*, 449 U.S. 117, 128 (1980) ("if the Government may reprosecute, it gains an advantage from what it learns at the first trial about the strengths of the defense case and the weaknesses of its own"); *United States v. Dinitz*, 424 U.S. 600, 611 (1976) (Double Jeopardy Clause bars retrials where "declaration of a mistrial . . . afford[s] the prosecution a more favorable opportunity to convict the defendant") (internal quotation marks omitted); *Somerville*, 410 U.S. at 469 (fatally flawed indictment that could not be corrected by amendment constituted manifest necessity for a mistrial, unlike mistrials that "operate[] as a post-jeopardy continuance to allow the prosecution an opportunity to strengthen its case"); *Gori v. United States*, 367 U.S. 364, 369 (1961) (Fifth Amendment prohibits a judge from "exercis[ing] his authority to help the prosecution, at a trial in which its case is going badly, by affording it another, more favorable opportunity to convict the accused").

The mistrial on the capital and first-degree murder counts in Blueford's case presents an even more "extreme" and "abhorrent" situation than envisioned in *Washington* and the other cases cited above. Those cases addressed situations in which judges and prosecutors were simply *predicting* that the jury might acquit and acted to avoid the *risk* of such an outcome. Here the jury openly pronounced that it was "unanimous against" guilt on the murder charges. Here the prosecution's case was not simply "going badly" on the murder charges, *Gori*, 367 U.S. at 369; the jury had announced that the prosecution had lost on those charges. Only then did the court declare a mistrial, one that necessarily will allow the prosecutor to "buttress weaknesses in his evidence" and "strengthen [his] case" before a new

jury on the identical charges. *Washington*, 434 U.S. at 507; *Somerville*, 410 U.S. at 469.

When a State like Arkansas requires a unanimous jury decision to acquit on a greater charge before the jury can even consider lesser-included charges, the State's failure to accept partial verdicts in appropriate cases cannot constitute "manifest necessity" for a mistrial on the counts where the jury voted to acquit. To permit a retrial on such charges would be redolent of the English practice under the Stuart monarchs.

CONCLUSION

Blueford's jury made a substantive ruling in his favor "of some or all of the factual elements of the offense[s] charged." *Martin Linen*, 430 U.S. at 571. Moreover, given the Arkansas rule that lesser offenses cannot be considered unless and until the jury unanimously acquits on the greater offenses, the jury deliberation on manslaughter necessarily means that it had acquitted on the murder charges. The jury's action also reflects a resolution of facts in Blueford's favor that may not be relitigated under principles of defensive collateral estoppel.

Nor was there any manifest necessity requiring a mistrial on the murder charges: The trial court could have accepted the jury's acquittal, or it could have given the jury a verdict form that allowed them to return a verdict of guilty or not guilty on those charges regardless of the outcome on the lesser-included counts. The plain effect, if not the purpose, of the mistrial was acquittal avoidance. Even if the jury's "unanimous against" declaration was not itself an "acquittal" on the murder charges, the jury obviously was prepared to return a formal acquittal on those charges if given the opportunity. No "legitimate state policy," *Somerville*, 410 U.S. at 469, justifies such an exercise in acquittal avoidance.

This Court accordingly should reverse the judgment of the Arkansas Supreme Court.

Respectfully submitted,

LISA S. BLATT
CHARLES G. CURTIS, JR.
Counsel of Record
ARNOLD & PORTER LLP
555 12th Street, NW
Washington, DC 20004
(202) 942-5000
Charles.Curtis@aporter.com

Counsel for Amici Curiae

APPENDIX

APPENDIX OF *AMICI CURIAE*

George C. Thomas III
Board of Governors Professor of Law and Judge Alexander P. Waugh, Sr. Distinguished Scholar
Rutgers School of Law—Newark

Michael Benza
Visiting Associate Professor of Law
Case Western Reserve University School of Law

Alafair Burke
Professor of Law
Hofstra University School of Law

Morgan Cloud
Charles Howard Candler Professor of Law
Emory University School of Law

Russell Covey
Associate Professor
Georgia State University College of Law

Joshua Dressler
Frank R. Strong Chair in Law
Michael E. Moritz College of Law, The Ohio State University

John J. Farmer, Jr.
Dean & Professor of Law
Rutgers University School of Law—Newark

Brian Gallini
Associate Professor of Law
University of Arkansas School of Law

Bennett L. Gershman
Professor of Law
Pace Law School, Pace University

Adam Gershowitz
Associate Professor of Law
University of Houston Law Center

Stuart Green
Professor of Law
Rutgers University School of Law—Newark

Lissa Griffin
Professor of Law
Pace Law School, Pace University

Bernard E. Harcourt
Professor and Chair, Department of Political Science
and Julius Kreeger Professor of Law
The University of Chicago

Stephen E. Henderson
Professor of Law
University of Oklahoma College of Law

Peter J. Henning
Professor of Law
Wayne State University Law School

Kyron James Huigens
Professor of Law
Benjamin N. Cardozo School of Law

Yale Kamisar
Clarence Darrow Distinguished University
Professor of Law Emeritus
University of Michigan Law School

Jeffrey L. Kirchmeier
Professor of Law
City University of New York School of Law

Alex Kreit
Associate Professor and Director of the Center for
Law & Social Justice
Thomas Jefferson School of Law

Arthur LaFrance
Visiting Professor of Law
University of Arizona James E. Rogers College of Law

Richard A. Leo
Associate Professor of Law
University of San Francisco

Michael J.Z. Mannheimer
Professor of Law
Salmon P. Chase College of Law
Northern Kentucky University

Lawrence C. Marshall
Professor of Law, Associate Dean for Clinical Education,
and David & Stephanie Mills Director of the
Mills Legal Clinic
Stanford Law School

Jonathan A. Rapping
Associate Professor of Law and Director of the
Honors Program in Criminal Justice
Atlanta's John Marshall Law School

Michael Risinger
John J. Gibbons Professor of Law
Seton Hall University School of Law

Susan D. Rozelle
Professor of Law
Stetson University College of Law

Laurent Sacharoff
Assistant Professor of Law
University of Arkansas School of Law-Fayetteville

Christopher Slobogin
Milton R. Underwood Chair in Law, Professor of Psychiatry,
and Director, Criminal Justice Program
Vanderbilt University School of Law

Carol Steiker
Howard J. and Katherine W. Aibel Professor of Law
Harvard Law School

AMICUS CURIAE BRIEF

No. 10-1320

In The Supreme Court of the United States

ALEX BLUEFORD,
Petitioner,

v.

STATE OF ARKANSAS,
Respondent.

On Writ of Certiorari to the Arkansas Supreme Court

BRIEF OF CONSTITUTIONAL ACCOUNTABILITY CENTER AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

DOUGLAS T. KENDALL
ELIZABETH B. WYDRA*
**Counsel of Record*
DAVID H. GANS
CONSTITUTIONAL ACCOUNTABILITY CENTER
1200 18th St., NW, Suite 1002
Washington, D.C. 20036
(202) 296-6889
elizabeth@theusconstitution.org

Counsel for Amicus Curiae

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

INTEREST OF *AMICUS CURIAE* 1

INTRODUCTION AND SUMMARY OF ARGUMENT 2

ARGUMENT 4

THE TEXT AND HISTORY OF THE DOUBLE JEOPARDY CLAUSE PROHIBIT ARKANSAS FROM RETRYING BLUEFORD ON THE CHARGES UNANIMOUSLY REJECTED BY THE JURY. 4

A. The Text and History of the Fifth Amendment's Double Jeopardy Clause Prohibit Retrial After Jury Acquittal. 5

B. The Trial Court's Declaration of a Mistrial Violated the Fifth Amendment's Protection of Jury Acquittals. 10

CONCLUSION 13

TABLE OF AUTHORITIES

Page

Cases

Arizona v. Washington,
434 U.S. 497 (1978) 11

Benton v. Maryland,
395 U.S. 784 (1969) 9

Blakely v. Washington,
542 U.S. 296 (2004) 12

Burks v. United States,
437 U.S. 1 (1978) 9-10

Commonwealth v. Cook,
6 Serg. & Rawle 577 (Pa. 1822) 13

Green v. United States,
355 U.S. 184 (1957) 3, 4, 5, 10, 12

Malloy v. Hogan,
378 U.S. 1 (1964) 9

McDonald v. City of Chicago,
130 S. Ct. 3020 (2010) 9

Monge v. California,
524 U.S. 721 (1998) 10

Oregon v. Kennedy,
456 U.S. 667 (1982) 11

Renico v. Lett,
130 S. Ct. 1855 (2010) 11

TABLE OF AUTHORITIES—continued

Page

United States v. Ball,
163 U.S. 662 (1896) 10

United States v. Gibert,
25 F. Cas. 1287 (C.C.D. Mass. 1834) 6

United States v. Martin Linen Supply Co.,
430 U.S. 564 (1977) 5, 10

United States v. Perez,
22 U.S. (9 Wheat.) 579 (1824) 11

United States v. Wilson,
420 U.S. 332 (1975) 8, 10, 11

Wade v. Hunter,
336 U.S. 684 (1949) 11

Constitutional Provisions and Legislative Materials

U.S. CONST. amend. V 3, 5

Annals of Congress, 1st Cong., 1st Sess. (1789)..... 8

Cong. Globe, 39th Cong., 1st Sess. 2765 (1866) 9

TABLE OF AUTHORITIES—continued

Page

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WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 6, 7

JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES (1833) 5, 6, 7, 12

INTEREST OF *AMICUS CURIAE*[1]

Constitutional Accountability Center (CAC) is a think tank, law firm and action center dedicated to fulfilling the progressive promise of our Constitution's text and history. CAC works in our courts, through our government, and with legal scholars to improve understanding of the Constitution and to preserve the rights, freedoms and structural safeguards it guarantees.

This case raises the question whether the Double Jeopardy Clause of the Fifth Amendment, applied to the states through the Fourteenth Amendment, permits the government to subject a criminal defendant to a second trial for the same serious offences a jury had acquitted him of, simply because the jury had deadlocked on a lesser-included offense. As an organization dedicated to the Constitution's text and history, CAC has an interest in safeguarding the right not to be placed twice in jeopardy of life or limb for the same crime and ensuring the integrity of the jury as a constitutional bulwark of liberty.

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[1] Counsel for all parties have consented to the filing of this brief; letters indicating this consent have been filed with the Clerk. Under Rule 37.6 of the Rules of this Court, *amicus* states that no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus* or its counsel made a monetary contribution to its preparation or submission.

INTRODUCTION AND SUMMARY OF ARGUMENT

The text and history of the Double Jeopardy Clause and this Court's jurisprudence plainly establish that the Double Jeopardy Clause prohibits the government, following acquittal by a jury, from subjecting a defendant to a second trial or prosecution for the same crime. Below, the Arkansas Supreme Court held that the Double Jeopardy Clause did not prevent the state from retrying Alex Blueford on charges that the jury in his first trial had unanimously rejected, relying on the fact that the jury had deadlocked on a lesser-included offense. This ruling is unconstitutional.

In complex criminal cases involving greater and lesser-included offenses, like Blueford's, Arkansas law instructs juries to consider the charges one at a time, beginning with the most serious and proceeding to lesser-included offenses only after the jury has unanimously voted to acquit the defendant of the more serious charges. While no official verdict was entered on the capital and first-degree murder charges, the jury unequivocally stated in open court that it had unanimously rejected those charges. Moreover, as a matter of state law, the jury could not have considered the lesser-included offense on which it ultimately deadlocked without first acquitting Blueford of the more serious offenses.

There is nothing in the Double Jeopardy Clause's text or history to suggest that its fundamental protection of liberty against

government overreaching is inapplicable to partial verdicts or the functional equivalent of a partial verdict, as in this case. Indeed, this Court's protection of "implicit acquittals" suggests that it is of no constitutional moment that the jury's acquittal in this case was not reflected in any order or judgment. *See, e.g.*, *Green v. United States*, 355 U.S. 184, 190 (1957) (holding that jury's refusal to convict on first-degree murder charge was an "implicit acquittal" protecting the defendant from retrial since "[h]e was forced to run the gantlet once on that charge and the jury refused to convict him").

Had the capital murder and first-degree murder offenses been the only charges sent to the jury at Blueford's trial, there could be no serious question that, after the jury's announcement in open court that they had voted unanimously to acquit Blueford on those two charges, the Double Jeopardy Clause would bar the prosecutor from retrying him on those offenses. The result should not be any different simply because, after the jurors told the trial court that they had voted unanimously to acquit Blueford of the more serious charges against him, the jury deadlocked on the lesser-included offense of manslaughter. The Double Jeopardy Clause protects Blueford from being "subject for the same offence to be twice put in jeopardy," U.S. CONST. amend. V, and forbids a second trial on the more serious charges against him that were unanimously and explicitly rejected by the jury.

ARGUMENT

THE TEXT AND HISTORY OF THE DOUBLE JEOPARDY CLAUSE PROHIBIT ARKANSAS FROM RETRYING BLUEFORD ON THE CHARGES UNANIMOUSLY REJECTED BY THE JURY.

The jury that heard Alex Blueford's case voted to acquit him of charges of capital and first-degree murder before deadlocking on the lesser-included offense of manslaughter. As the forewoman of the jury explained in open court, the jury was "unanimous against" the charges of capital and first-degree murder, but could not unanimously resolve the manslaughter charge. *See* Joint App. at 64-65. Because of the deadlock on the manslaughter charge, the jury did not consider the least serious of the four charges against Blueford, negligent homicide. *Id.* at 65.

By holding that Arkansas could prosecute Blueford for capital and first-degree murder, notwithstanding the jury's unanimous rejection of both charges, the decision below threatens core constitutional values at the heart of the Fifth and Fourteenth Amendments. This Court has squarely held that a jury's refusal to convict on a more serious charge is an "implicit acquittal" triggering double jeopardy protections, given that the defendant had been "forced to run the gantlet once on that charge and the jury refused to convict him." *Green v. United States*, 355 U.S. 184, 190 (1957). While the state, of course, is free to retry Blueford on the charges on which the jury deadlocked or did

not decide—*i.e.*, the manslaughter and negligent homicide charges—the Double Jeopardy Clause makes the jury's vote to acquit Blueford on capital and first-degree murder charges final.

A. The Text and History of the Fifth Amendment's Double Jeopardy Clause Prohibit Retrial After Jury Acquittal.

The Double Jeopardy Clause of the Fifth Amendment provides "nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb." U.S. CONST. amend. V. In incorporating into the Constitution this critical safeguard of liberty, the framers of the Fifth Amendment secured to all persons an individual right against "being subjected to the hazards of trial and possible conviction more than once for an alleged offense," *Green*, 355 U.S. at 187, and a structural protection of trial by jury. When the jury votes to acquit, exercising its "overriding responsibility to stand between the accused and a potentially arbitrary or abusive Government," *United States v. Martin Linen Supply Co.*, 430 U.S. 564, 572 (1977), retrial is absolutely barred.

The Double Jeopardy Clause has its origins in English common law, and the Americans of the founding generation viewed the prohibition on double jeopardy as a fundamental right essential to the protection of liberty from government over-reaching. *See* 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES, § 1781, at 659 (1833) (calling the prohibition on double

jeopardy "another great privilege secured by the common law"). The Double Jeopardy Clause was one of several amendments in the Bill of Rights that "fortify and guard th[e] inestimable right of trial by jury," *United States v. Gibert*, 25 F. Cas. 1287, 1294 (C.C.D. Mass. 1834) (Story, J.), a "part of that admirable common law, which had fenced round, and interposed barriers on every side against the approaches of arbitrary power." 3 STORY, COMMENTARIES ON THE CONSTITUTION, § 1773, at 652-53.

In his famous Commentaries on the Laws of England, William Blackstone described the two common law pleas, *autrefois acquit* and *autrefois convict*, that inspired the text of the Double Jeopardy Clause. "[T]he plea of *autrefois acquit*, or a former acquittal, is grounded on the universal maxim of the common law of England, that no man is to be brought into jeopardy of his life, more than once . . . . [W]hen a man is once fairly found not guilty . . . before any court of competent jurisdiction, he may plead such acquittal in bar of any subsequent accusation for the same crime." 4 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND *335. Blackstone explained that the second of these pleas, "*autrefois convict*, or a former conviction for the same identical crime, though no judgment was ever given," also "depends on the same principle as the former, that no man ought to be twice brought in danger of his life for one and the same crime." *Id.* at *336.

Blackstone's analysis highlighted the close connections between trial by jury, a right

Blackstone called "the grand bulwark of [every Englishman's] liberties," *id.* at *349, and double jeopardy principles. As Blackstone observed, "[T]here hath yet been no instance of granting a new trial where the prisoner was *acquitted* up on the first. If the jury, therefore, find the prisoner not guilty, then he is for ever quit and discharged of the accusation . . . ." *Id.* at *361. Double jeopardy principles, dating all the way back to Blackstone, thus "safeguard not simply the individual defendant's interest in avoiding vexation but also the integrity of the initial petit jury's judgment." AKHIL REED AMAR, THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION 96 (1998).

Drawing on Blackstone, the framers of the Bill of Rights wrote this critical guarantee against government overreaching explicitly into the Constitution, providing "a double security against the prejudices of judges, who may partake of the wishes and opinions of government, and against the passions of the multitude, who may demand their victim with a clamorous precipitancy." 3 STORY, COMMENTARIES ON THE CONSTITUTION, § 1774, at 653. Debates over the Bill of Rights explicitly affirmed the fundamental double jeopardy principle that a jury's acquittal is final, barring either a new trial or a successive prosecution.

During debates on an early version of the Double Jeopardy Clause proposed by James

Madison,[2] the framers repeatedly affirmed the finality of a jury's acquittal, barring a second trial or prosecution. Rep. Roger Sherman observed that "the courts of justice would never think of trying and punishing twice for the same offence. If the person was acquitted on the first trial, he ought not to be tried a second time." Annals of Congress, 1st Cong., 1st Sess. 782 (1789). Rep. Samuel Livermore noted that "[m]any persons may be brought to trial . . . but for want of evidence may be acquitted; in such cases, it is the universal practice in Great Britain, and in this country, that persons shall not be brought to a second trial for the same offence." *Id.* In this respect, the Double Jeopardy Clause provided an important structural protection of trial by jury, a right James Madison noted was "as essential to secure the liberty of the people as any one of the pre-existent rights of nature." *Id.* at 454.

Madison's initial proposal was amended in the Senate. In its final form, the Fifth Amendment's Double Jeopardy Clause used "the more traditional language employing the familiar concept of jeopardy, . . . language that tracked Blackstone's statement of the principles of *autrefois acquit* and *autrefois convict*." *United States v. Wilson*, 420 U.S. 332, 341-42 (1975).

The Double Jeopardy Clause included in the Bill of Rights did not originally apply to the actions

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[2] Madison's initial proposal provided that "No person shall be subject, except in cases of impeachment, to more than one punishment or one trial for the same offence." Annals of Congress, 1st Cong., 1st Sess. 451-52 (1789).

of state governments, but eighty years later, "[t]he constitutional amendments adopted in the aftermath of the Civil War fundamentally altered our country's federal system." *McDonald v. City of Chicago*, 130 S. Ct. 3020, 3028 (2010). Introducing the Fourteenth Amendment in the Senate, Jacob Howard explained that its broad text protected against state action all of the "personal rights guaranteed and secured by the first eight amendments of the Constitution," Cong. Globe, 39th Cong., 1st Sess. 2765 (1866), including the Fifth Amendment's prohibition on double jeopardy.

It is now firmly established under this Court's precedents that the Fifth Amendment's Double Jeopardy Clause "is a fundamental ideal in our constitutional heritage that . . . appl[ies] to the States through the Fourteenth Amendment," *Benton v. Maryland*, 395 U.S. 784, 794 (1969), and forbids the government—whether state or federal—from retrying a defendant following a jury's acquittal. "[I]ncorporated Bill of Rights protections 'are all to be enforced against the States under the Fourteenth Amendment according to the same standards that protect those personal rights against federal encroachment,'" *McDonald*, 130 S. Ct. at 3035 (quoting *Malloy v. Hogan*, 378 U.S. 1, 10 (1964)).

Consistent with the text and history of the Fifth Amendment, this Court has repeatedly held that retrial following an acquittal is strictly prohibited. In interpreting the Double Jeopardy Clause to give "absolute finality to a jury's verdict of acquittal," *Burks v. United States*, 437 U.S. 1, 16

(1978), this Court has drawn specifically on the Fifth Amendment's text and history, quoting at length from Blackstone and demonstrating that his Commentaries "greatly influenced the generation that adopted the Constitution," *Green*, 335 U.S. at 187 (discussing Blackstone), and informed the specific wording of the Fifth Amendment's Double Jeopardy Clause. *See Wilson*, 420 U.S. at 341-42.

It is thus no surprise that the Court has recognized that "[p]erhaps the most fundamental rule in the history of double jeopardy jurisprudence has been that '[a] verdict of acquittal . . . could not be reviewed, on error or otherwise, without putting [a defendant] twice in jeopardy, and thereby violating the Constitution.'" *Martin Linen*, 430 U.S. at 571 (quoting *United States v. Ball*, 163 U.S. 662, 671 (1896)); *see also Green*, 355 U.S. at 188 ("[A] verdict of acquittal is final, ending a defendant's jeopardy, and even when 'not followed by any judgment, is a bar to a subsequent prosecution for the same offence.'") (quoting *Ball*, 163 U.S. at 671). Giving the government a second chance to prove an acquitted defendant guilty of the same crime "would violate the very core of the double jeopardy prohibition." *Monge v. California*, 524 U.S. 721, 741 (1998) (Scalia, J., dissenting).

B. The Trial Court's Declaration of a Mistrial on the Murder Charges Violated the Fifth Amendment's Protection of Jury Acquittals.

As discussed above, "the Double Jeopardy Clause affords a criminal defendant a 'valued right

to have his trial completed by a particular tribunal.'" *Oregon v. Kennedy*, 456 U.S. 667, 671-72 (1982) (quoting *Wade v. Hunter*, 336 U.S. 684, 689 (1949)). Nonetheless, a court may, in narrow circumstances of "manifest necessity" declare a mistrial and allow for retrial. *United States v. Perez*, 22 U.S. (9 Wheat.) 579, 580 (1824); *see also Wilson*, 420 U.S. at 344 n.12 ("In *Perez*, the Court emphasized the limited scope of this exception."). Because the declaration of a mistrial threatens the defendant's "valued right" to "have his trial completed by a particular tribunal," the state must shoulder a "heavy" burden to justify a mistrial and "avoid the double jeopardy bar." *Arizona v. Washington*, 434 U.S. 497, 505 (1978). *See also Renico v. Lett*, 130 S. Ct. 1855, 1862-64 (2010). "The policy of avoiding multiple trials has been regarded as so important that exceptions to the principle have only been grudgingly allowed." *Wilson*, 420 U.S. at 343.

There was no manifest need for a mistrial on the murder charges against Blueford. While a jury deadlock is "the classic basis for a proper mistrial," in this case the jury unanimously rejected the capital and first-degree murder charges against Blueford and the trial court should not have declared a mistrial with respect to these charges. A court's wide discretion to call a mistrial where "there is a manifest necessity for the act, or the ends of public justice would be defeated," *Perez*, 22 U.S. (9 Wheat.) at 580, ends where the jury has, in fact, acquitted the defendant of all or some of the charges against him or her.

In considering whether Blueford should be subjected to the ordeal of retrial, it is of no constitutional moment that the jury's acquittal was not reflected in any order or formal judgment. The Fifth Amendment's prohibition on double jeopardy protects the jury's decision that the defendant is not guilty of the charges against him and is entitled to an acquittal—not the ministerial act of reducing their vote to a judgment. The framers, who were concerned that "the prejudice of judges . . . may partake of the wishes and opinions of the government," 3 STORY, COMMENTARIES ON THE CONSTITUTION, § 1774, at 653, gave the jury final say over a criminal defendant's fate in a very real sense, not just as a formalism. *See generally Blakely v. Washington*, 542 U.S. 296, 305-06 (2004) ("[T]he right of jury trial . . . . is no mere procedural formality, but a fundamental reservation of power in our constitutional structure."). The Double Jeopardy Clause applies even when there is no formal verdict or judgment of acquittal, so long as the jury has made clear its acquittal. *See Green*, 335 U.S. at 190 (holding that jury's refusal to convict on first-degree murder charge was an "implicit acquittal" protecting the defendant from retrial since "[h]e was forced to run the gantlet once on that charge and the jury refused to convict him").

Under the text and history of the Double Jeopardy Clause, the jury's acquittal of Blueford on charges of capital and first-degree murder was final, forever barring a second trial on those charges. Blueford should not be deprived of double jeopardy protections as to those charges simply

because the jury could not agree as to other charges against him. *Cf. Commonwealth v. Cook*, 6 Serg. & Rawle 577, 581-83 (Pa. 1822) (finding mistrial improper as to all defendants where jury acquitted two defendants of the charges, but deadlocked on third defendant). *See generally* Br. of Petitioner at 22-24. There was no "manifest necessity" to discharge the jury and retry Blueford on the murder charges. The jury unambiguously and unanimously refused to convict Blueford of capital and first-degree murder and the trial court should have accepted the jury's determination. The Arkansas Supreme Court's ruling to the contrary conflicts with the Constitution's prohibition against being placed "twice in jeopardy" for "the same offence."

CONCLUSION

For the foregoing reasons, *amicus* urges the Court to reverse the judgment of the Arkansas Supreme Court.

Respectfully submitted,

DOUGLAS T. KENDALL
ELIZABETH B. WYDRA
Counsel of Record
DAVID H. GANS
CONSTITUTIONAL ACCOUNTABILITY CENTER
1200 18th Street NW, Suite 1002
Washington, D.C. 20036
(202) 296-6889
elizabeth@theusconstitution.org

Counsel for Amicus Curiae

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AMICUS CURIAE BRIEF

RECORD
AND
BRIEFS

No. 10-1320

In the Supreme Court of the United States

ALEX BLUEFORD, PETITIONER

v.

STATE OF ARKANSAS

ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF ARKANSAS

BRIEF OF *AMICI CURIAE* STATE OF MICHIGAN, 22 OTHER STATES, AND 1 TERRITORY IN SUPPORT OF THE STATE OF ARKANSAS

Bill Schuette
Attorney General

John J. Bursch
Michigan Solicitor General
Counsel of Record
P.O. Box 30212, Lansing,
Michigan 48909
BurschJ@michigan.gov
(517) 373-1124

B. Eric Restuccia
Deputy Solicitor General

Katherine Montgomery
Research Assistant

Department of Attorney General
State of Michigan
Attorneys for *Amici Curiae*

Library of Congress
Law Library

Luther Strange
Attorney General
State of Alabama
501 Washington Ave.
Montgomery, AL 36130

Fepuleaʻi Arthur Ripley, Jr.
Attorney General
Territory of
American Samoa
P.O. Box 7
Pago Pago, AS 96799

Tom Horne
Attorney General
State of Arizona
1275 W. Washington St.
Phoenix, AZ 85007

John W. Suthers
Attorney General
State of Colorado
1525 Sherman St.
Denver, CO 80203

Joseph R. Biden, III
Attorney General
State of Delaware
820 N. French St.
Wilmington, DE 19801

Pamela Jo Bondi
Attorney General
State of Florida
The Capitol, PL-01
Tallahassee, FL 32399

David M. Louie
Attorney General
State of Hawaii
425 Queen St.
Honolulu, HI 96813

Lawrence G. Wasden
Attorney General
State of Idaho
P.O. Box 83720
Boise, ID 83720-0010

Tom Miller
Attorney General
State of Iowa
1305 E. Walnut
Des Moines, IA 50319

Derek Schmidt
Attorney General
State of Kansas
120 S.W. 10th Ave., 2nd Fl.
Topeka, KS 66612-1597

James D. "Buddy" Caldwell
Attorney General
State of Louisiana
P.O. Box 94005
Baton Rouge, LA 70804

Lori Swanson
Attorney General
State of Minnesota
102 State Capitol
75 Rev. Dr. Martin
Luther King Jr. Blvd.
St. Paul, MN 55155

Steve Bullock
Attorney General
State of Montana
P.O. Box 201401
Helena, MT 59620-1404

Catherine Cortez Masto
Attorney General
State of Nevada
100 N. Carson St.
Carson City, NV 89701

Gary K. King
Attorney General
State of New Mexico
P.O. Drawer 1508
Santa Fe, NM 87504

Roy Cooper
Attorney General
State of North Carolina
P.O. Box 629
Raleigh, NC 27602

Wayne Stenehjem
Attorney General
State of North Dakota
600 E. Boulevard Ave.
Bismarck, ND 58505

E. Scott Pruitt
Attorney General
State of Oklahoma
313 N.E. 21st St.
Oklahoma City, OK
73105-4894

Alan Wilson
Attorney General
State of South Carolina
P.O. Box 11549
Columbia, SC 29211

Marty J. Jackley
Attorney General
State of South Dakota
1302 E. Highway 14
Ste. 1
Pierre, SD 57501-8501

Mark Shurtleff
Attorney General
State of Utah
P.O. Box 140858
Salt Lake City, UT 84114

J.B. Van Hollen
Attorney General
State of Wisconsin
P.O. Box 7857
Madison, WI 53707

Gregory A. Phillips
Attorney General
State of Wyoming
123 State Capitol
Cheyenne, WY 82002

QUESTION PRESENTED

Whether, if a jury deadlocks on a lesser-included offense, the Double Jeopardy Clause bars reprosecution of a greater offense after a jury announces that it has voted against guilt on the greater offense.

TABLE OF CONTENTS

QUESTION PRESENTED i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iii

INTEREST OF *AMICI CURIAE* 1

INTRODUCTION AND SUMMARY OF ARGUMENT 2

I. There is no double jeopardy violation where a state court determines that the foreperson's statement does not constitute the jury's verdict. 3

A. The federal rule is that a verdict is not final when announced. 3

B. The Arkansas Supreme Court was reasonable in its factual determination that there was no verdict, and the Constitution does not require otherwise. 8

II. There is a legitimate diversity on the issue when a verdict is final, and federalism dictates that this diversity be respected. 13

III. The Constitution does not require state jurisdictions to take partial verdicts. 16

A. The State of Arkansas is not an "acquittal first" jurisdiction. 17

B. There is no constitutional requirement that juries be forced to issue partial verdicts, even for "acquittal first" jurisdictions. 18

CONCLUSION 23

TABLE OF AUTHORITIES

Page

Cases

Arizona v. *Washington*,
434 U.S. 497 (1978) 21

Ball v. *United States*,
163 U.S. 662 (1896) 3, 9

Barnum v. *State*,
594 S.W.2d 229 (Ark. 1980) 8

Bradford v. *State*,
94 S.W.3d 904 (Ark. 2003) 8

Cabberiza v. *Moore*,
217 F.3d 1329 (11th Cir. 2000) 7

Commonwealth v. *Dias*,
646 N.E.2d 1065 (Mass. 1995) 15

Government of the Virgin Islands v. *Hercules*,
875 F.2d 414 (3d Cir. 1989) 4, 6, 7

Green v. *United States*,
372 U.S. 184 (1957) 10, 12, 16, 18

Humphries v. *District of Columbia*,
174 U.S. 190 (1899) 6, 7

Kepner v. *United States*,
195 U.S. 100 (1904) 3

People v. *Hickey*,
303 N.W.2d 19 (Mich. App. 1981) 22

People v. *Richardson*,
184 P.3d 755 (Colo. 2008) 10, 15

Price v. *Georgia*,
398 U.S. 323 (1970) ..... passim

Price v. *Vincent*,
538 U.S. 634 (2003) 12, 13

Renico v. *Lett*,
130 S. Ct. 1855 (2010) 21

Smith v. *Massachusetts*,
543 U.S. 462 (2005) 14

State v. *Davis*,
266 S.W.3d 896 (Tenn. 2008) 18, 19, 20, 22

State v. *Pare*,
755 A.2d 180 (Conn. 2000) 15

State v. *Tate*,
773 A.2d 308 (Conn. 2001) 10, 15

United States v. *Beldin*,
737 F.3d 450 (5th Cir. 1984) 7

United States v. *Chinchic*,
655 F.2d 547 (4th Cir. 1981) 5

United States v. *Love*,
597 F.2d 81 (6th Cir. 1979) 4, 9

United States v. *Marinari*,
32 F.3d 1209 (7th Cir. 1994) 5, 6

United States v. *Rastelli*,
870 F.2d 822 (2d Cir. 1989) 5, 10, 11

United States v. *Taylor*,
507 F.2d 166 (5th Cir. 1975) 5

Walker v. *State*,
825 S.W.2d 822 (Ark. 1992) 10

Statutes

ARK. CODE ANN. § 16-89-126(a) 8

ARK. CODE ANN. § 16-89-128 8

Other Authorities

LaFave & Scott, Criminal Procedure (3d ed),
§ 24.9(d), pp 522–523..... 15

Moore's Federal Practice (3d ed),
§ 631.20[2][a]. 631–51 4

Wright's Federal Practice and Procedure,
§ 516, p. 52 ..... 5, 20

Rules

FED. R. CRIM. P. 31(a) 4

FED. R. CRIM. P. 31(d) 4

INTEREST OF *AMICI CURIAE*

As independent sovereigns, the 22 *amici* and 1 territory (*amici* states) exercise the chief police powers of government, serving as guardians of community safety. The vast majority of criminal jury trials that are held in this country occur in state court, and the jury-decisional process is governed by state procedural rules. The question when a verdict is final and has been received is a critical one to the *amici* states, and there is a legitimate diversity in the processes by which the states render their verdicts.

Among the legitimate options is the Arkansas process, which does not require the issuance of partial verdicts where the jury is deadlocked only as to lesser-included offenses. The Arkansas Supreme Court's holding was a constitutional one that there was no formal announcement of a verdict by the foreperson in the circumstance of the case, where there was no opportunity for the other jurors to give assent to this statement. In fact, the principle that a verdict is *not* final when announced is the federal procedural rule.

The *amici* states seek to ensure that in establishing constitutional standards to shield criminal defendants from double jeopardy, this Court does not impose unnecessarily a single, uniform rule that negates the different—and fair—state processes currently in place for determining when a state jury verdict is final.

INTRODUCTION AND SUMMARY OF ARGUMENT

The *amici* states advance three distinct points in support of the State of Arkansas.

First, the Arkansas Supreme Court's conclusion that no verdict was rendered here was a constitutional one. The federal rule is that a verdict is not final when announced; it is only final when returned in open court, the parties are given an opportunity to poll the jurors, and polling (if requested) indicates a unanimous verdict. The Arkansas Supreme Court did not violate double jeopardy when it concluded that the foreperson's unofficial statement did not equate to a final verdict.

Second, the issue of what constitutes a final verdict is a question of state procedural law that should not be subject to a uniform federal rule, particularly when there already exists a legitimate diversity among the states. There is no constitutional requirement that a foreperson speak definitively for the entire jury, and no requirement that a foreperson's provisional report about the jury's status must be accepted as a verdict.

Third, this Court should not impose on state courts a federal rule mandating partial verdicts for those states that instruct juries to deliberate on lesser-included offenses only after first acquitting on greater offenses. The State of Arkansas has persuasively argued here that it does not fit within this category. But even for those jurisdictions that do, a state may legitimately determine that such a requirement may be coercive and would invade the jury's province. It is not constitutionally required.

ARGUMENT

I. There is no double jeopardy violation where a state court determines that the foreperson's statement does not constitute the jury's verdict.

A. The federal rule is that a verdict is not final when announced.

The central, controlling question in this appeal is whether the foreperson announced the official verdict of the entire jury when she informally mentioned to the trial court that the jury was unanimously "against" a finding of capital murder and first-degree murder in giving a report of the jury's status. J. App. 64, 65. Under Arkansas law, such a casual declaration did not constitute a verdict on behalf of the entire jury. In fact, under the federal rule, the result would be the same.

For 115 years, this Court has contemplated that a verdict of acquittal be "duly returned and received" before jeopardy will attach. *Ball* v. *United States*, 163 U.S. 662, 671 (1896) ("As to the defendant who had been acquitted by the verdict duly returned and received, the court could take no other action than to order his discharge. The verdict of acquittal was final, and could not be reviewed, on error or otherwise, without putting him twice in jeopardy, and thereby violating the constitution."); *Kepner* v. *United States*, 195 U.S. 100, 130 (1904) (double jeopardy attaches after an acquittal verdict has been "duly rendered"). But this Court has not explained what is constitutionally necessary for an acquittal verdict to be "duly returned and received" or "duly rendered."

Instead, an acquittal's finality depends on the individual circumstances of each case, and this Court has appropriately allowed individual states to decide for themselves, as a matter of state procedural law, whether a state verdict is final for purposes of jeopardy.

In the federal circuits, Rule 31 governs the receiving of a verdict in criminal cases. And the federal rule requires more than a mere "announcement" by the foreperson of the current juror break-down on a particular charge. Rather, the jury must provide its verdict, unanimously in open court. FED. R. CRIM. P. 31(a). And the rules require that the parties be given an opportunity to poll the jury before discharge. FED. R. CRIM. P. 31(d) ("After a verdict is returned but before the jury is discharged, the court must on a party's request, or may on its own, poll the jurors individually. If the poll reveals a lack of unanimity, the court may direct the jury to deliberate further or may declare a mistrial and discharge the jury.").

As a consequence of these procedures, the federal circuits have determined that "a verdict is not final when announced." E.g., *United States* v. *Love*, 597 F.2d 81, 84 (6th Cir. 1979). Accord *Government of the Virgin Islands* v. *Hercules*, 875 F.2d 414, 419 (3d Cir. 1989); Moore's Federal Practice (3d ed), § 631.20[2][a], 631–51 ("[t]he verdict is not final when it is announced but is final only when it has been recorded."). This conclusion is premised on the opportunity in Rule 31(d) to have the jury polled to confirm that the announced verdict reflects the opinions of all of the jurors and not just the foreperson, or the written indications on the verdict forms. See *Hercules*, 875 F.2d at 419 ("we find that the

mere reliance on verdict slips signed in the juryroom is inadequate . . . [j]urors must be given an opportunity to express their agreement or disagreement with the verdict.").

As a result, the jury's verdict cannot become final until the "deliberations are over, the result is announced in open court, and no dissent by a juror is registered." *United States* v. *Rastelli*, 870 F.2d 822, 834 (2d Cir. 1989), quoting *United States* v. *Taylor*, 507 F.2d 166, 168 (5th Cir. 1975) (internal quotes omitted). Accord, e.g., *United States* v. *Chinchic*, 655 F.2d 547, 550 (4th Cir. 1981); Wright's Federal Practice and Procedure, § 516, p. 52 ("A verdict is valid and final when the deliberations are over, the result is announced in open court, and no juror registers dissent."). It is only after the jurors are discharged that the verdict can become final and thus "unalterable." *United States* v. *Marinari*, 32 F.3d 1209, 1214–1215 (7th Cir. 1994) ("There is a long line of cases which demonstrate the practical reason why finality of the verdict comes upon the separation and dispersal of the jurors. It is from that time that the jurors are exposed to outside contacts. . . . Thus, in the absence of a poll, it is upon separation and dispersal of the jury that the verdict, initially read into the record, becomes final and unalterable[.]").

This Court has emphasized the significance of allowing the parties to poll the juries; the process confirms that each juror is assenting to the decision announced, there has not been a mistake, and that the verdict is not a product of coercion:

> That, generally, the right to poll a jury exists, may be conceded. Its object is to ascertain for a

> certainty that each of the jurors approves of the verdict as returned: that no one has been coerced or induced to sign a verdict to which he does not fully assent.

Humphries v. *District of Columbia*, 174 U.S. 190, 194 (1899).

In *Humphries*, a civil case, there was a claim that the jury's verdict was null and void based on the trial court's failure to allow the jury to be polled where the jury's verdict had been submitted in writing, sealed, and one of the jurors was unable to return to court for the announcement of the verdict due to illness. *Humphries*, 174 U.S. at 192–194. The other jurors confirmed under oath that they had signed the verdict as had the ill juror. *Id.* This Court determined that the defect of failing to enable an ill juror to be polled did not "render the verdict a nullity" when it was "clear the verdict *has received the assent of all the jurors*[.]" *Id.* at 195 (emphasis added).

Under federal law, then, one of the controlling considerations for verdict finality depends on the assent of all the jurors. And when a trial court violates Rule 31(d)'s polling requirement, the federal circuits have reversed and ordered an entirely new trial. E.g., *Marinari*, 32 F.3d at 1215 ("The delayed request for a poll was timely because it came prior to the separation of the jury and thus before the verdict was 'recorded.' Given the defendant's absolute right to a poll of the jury at the time it was requested, it was error *per se* for the district court not to recall the jury and conduct an oral poll."); *Hercules*, 875 F.2d at 419 ("we hold that a violation of Rule 31(d) is *per se* error requiring reversal of Hercules' conviction").

The decision in *Hercules* is particularly notable because there were twelve verdict forms, one for each count, apparently signed by each of the jurors. Notwithstanding that fact, the Third Circuit Court of Appeals determined that the opportunity of the other jurors to assent in "open court" was indispensable to the rendering of a true, final verdict. *Hercules*, 875 F.3d at 419. This was so despite the fact that the requirement of polling is not constitutionally required, but only by federal rule in the federal courts. *Cabberiza* v. *Moore*, 217 F.3d 1329, 1336–1337 (11th Cir. 2000) ("Although polling the jury is a common practice, we know of no constitutional right to have a poll conducted"); *United States* v. *Beldin*, 737 F.3d 450, 455 (5th Cir. 1984) ("The right to poll the jury derives not from the Constitution, but from rule 31(d)").

The federal rules reflect common sense wisdom that the mere fact that the foreperson has *announced* the jurors' disposition regarding their vote does not necessarily mean that the announcement represents the *actual* verdict of a unanimous jury. Consistent with this Court's analysis in *Humphries* and Rule 31(d) itself, a jurisdiction might reasonably require unanimous juror assent in open court before a verdict may be rendered final.

B. The Arkansas Supreme Court was reasonable in its factual determination that there was no verdict, and the Constitution does not require otherwise.

Under Arkansas procedural law, a judgment rendered in open court is not controlling until it is entered or filed of record. Pet. App. 9a, citing *Bradford* v. *State*, 94 S.W.3d 904 (Ark. 2003). Like the federal requirement, Arkansas law provides that, "When the jury has agreed upon their verdict, they must be conducted into court by the officer having them in charge, their names called by the clerk, and, if they all appear, their foreman must declare their verdict." ARK. CODE ANN. § 16-89-126(a). Just as in the federal system, Arkansas allows the jury to be polled regarding their decision. See ARK. CODE ANN. § 16-89-128 ("Upon a verdict's being rendered, the jury may be polled at the instance of either party, which consists of the clerk or judge asking each juror if it is his or her verdict. If one (1) answers in the negative, the verdict cannot be received."). Finally, in Arkansas, it is the jury's intention that governs the meaning of a verdict, and an ambiguous verdict may be clarified before it has been entered of record. *Barnum* v. *State*, 594 S.W.2d 229, 231 (Ark. 1980) ("Amendment of a verdict, made before it is entered of record, before the jury has separated, and after a poll of each juror reveals that each understands the effect of the verdict, is entirely proper.").

In applying these rules, the Arkansas Supreme Court correctly determined that "[t]he mere reading of the jury's verdict in open court does not constitute an acquittal." Pet. App. 9a. This conclusion is perfectly

consonant with the federal rules governing a verdict's finality. E.g., *Love*, 597 F.2d at 84 ("a verdict is not final when announced"). Blueford's contention—that the Arkansas Supreme Court relied exclusively on the failure to enter the judgment in violation of *Ball*, Pet. Br. 21—does not consider the Arkansas Supreme Court's full opinion.

The Arkansas court focused on the fact that the foreperson did not intend her statement to be the formal announcement of a verdict, but rather only a declaration of the status of deliberations at that point:

> [T]he jury forewoman was not making a formal announcement of acquittal. She was engaged in a discussion with the circuit court about the jury's deliberation and the jurors' inability to agree on a verdict. Thus, this is not a situation where a formal verdict was announced or entered of record.

Pet. App. 10a–11a. This factual statement is unimpeachable; no one could contend that the foreperson was informing the court of the jury's official verdict. The foreperson did not purport to be making a definitive statement about the jury's posture with regard to the greater offenses, but rather one about the deliberations' deadlocked nature.

The argument that the foreperson's informal statement equaled an official jury verdict for which jeopardy has attached is not supported by this Court's precedent or the case law from the federal circuits, and is contradicted expressly by the federal rules themselves.

Most telling, after hearing the foreperson's statement, the trial court here asked the jury to continue deliberating. That fact alone established that there had been no definitive verdict. See, e.g., *Rastelli*, 870 F.2d at 834 ("the jury's verdict is not final until the deliberations are over") (internal quotes omitted). There was no requirement as a matter of Arkansas law, or as matter of federal constitutional law, that obligated the trial court to inquire into, and receive a verdict on, the greater offenses where the jury had indicated that it was deadlocked on a lesser offense. Following the majority of state jurisdictions, Arkansas has elected to reject the obligation to inquire about other included offenses where the jury indicates that it is deadlocked. Pet. App. 13a, citing *Walker* v. *State*, 825 S.W.2d 822 (Ark. 1992). See also *People* v. *Richardson*, 184 P.3d 755, 763 (Colo. 2008) (describing as the "majority" rule the one in which "judges should not initiate any inquiry into partial verdicts premised on lesser included offenses within a single complaint or count of an indictment").

It is true that a minority of states follows a different rule and requires the trial court to inquire further if faced with similar circumstances. E.g., *State* v. *Tate*, 773 A.2d 308, 324 (Conn. 2001) (finding error requiring the application of double jeopardy where the trial court refused to inquire whether the jury had reached a partial verdict). But there is no constitutional reason why all states must follow the minority rule, and this Court has not said otherwise. The decisions on which Petitioner relies, *Price* v. *Georgia*, 398 U.S. 323 (1970), and *Green* v. *United States*, 372 U.S. 184 (1957), are distinguishable. Each rests on the conclusion that a conviction on a lesser

offense operates as an acquittal of the charged offense. Thus, the charged offense may not be retried. *Price*, 398 U.S. at 328–29 ("this Court has consistently refused to rule that jeopardy for an offense continues after an acquittal, whether that acquittal is express or implied by a conviction on a lesser included offense when the jury was given a full opportunity to return a verdict on the greater charge"). In stark contrast here, there has been no "verdict," but only a provisional, unofficial statement by a foreperson, unsupported by the assent of all jurors in open court.

Consider the circumstance in this case if the jury had ultimately returned a verdict of first-degree murder after the trial court directed further deliberation. Blueford's position would have to be that such a verdict would be improper, because the foreperson's first, unofficial statement would foreclose such a verdict. But the Constitution requires no such result. To the contrary, the fact that the jury was directed to continue deliberations without limitation *confirmed* that there had been no verdict with regard to the greater offenses. *Rastelli*, 870 F.2d at 834. The issue whether the trial court should be required to inquire further and receive a verdict should be left to the states.

If Arkansas followed the minority rule, and the trial court did (1) inquire further, (2) ask for a verdict on the two greater charges of capital murder and first-degree murder, (3) allow for a polling with respect to these counts, (4) accept the verdict of acquittal on these two counts, and (5) ask the jury to deliberate further with regard to the remaining charges of manslaughter and negligent homicide, then jeopardy could have

attached to the jury's verdict. But this did not happen: there was no verdict. Jeopardy did not attach for the greater charges because the foreperson's statement did not, standing alone, constitute a verdict.[1]

In an analogous setting, this Court unanimously ruled that a state court did not violate clearly established federal law when it decided that an acquittal must be sufficiently final for jeopardy to terminate. In *Price* v. *Vincent*, 538 U.S. 634 (2003), the defendant's counsel moved for a directed verdict of acquittal on the first-degree murder charge following the prosecutor's case-in-chief. The trial court responded by stating: "'[M]y impression at this time is that there's not been shown premeditation or planning in the, in the alleged slaying. That what we have at the very best is Second Degree Murder. . . . I think that Second Degree Murder is an appropriate charge as to the defendants." *Price* v. *Vincent*, 538 U.S. at 637 (citation omitted). But after the trial court said this, it granted the prosecutor's request to speak about the first-degree murder charge the following day. The next morning, the defendant's counsel argued that jeopardy had terminated for the first-degree murder charge, and the prosecution should be barred from further pursuing it.

The Michigan Supreme Court ruled that jeopardy did not terminate because the judge's statement was

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[1] It is also worth noting that there is no dispute that if a partial verdict had been rendered and accepted of acquittal for Blueford of capital murder and first-degree murder, that such a decision would bar his reprosecution on double jeopardy grounds. *Price* and *Green* would govern.

not a final acquittal of the first degree murder charge; instead, it required the judgment to "bear sufficient indicia of finality" in order for jeopardy to terminate. *Price* v. *Vincent*, 538 U.S. at 642 (citation omitted). The Michigan Supreme Court, in turn, looked at the particular circumstances and applied factors for determining finality. On habeas review, even though this Court withheld judgment for direct review, this Court held that the Michigan court acted reasonably when it concluded that there was no double jeopardy violation. *Price* v. *Vincent*, 538 U.S. at 643. The Arkansas Supreme Court acted equally reasonably here.

II. There is a legitimate diversity on the issue when a verdict is final, and federalism dictates that this diversity be respected.

The states' procedural rules governing the process of determining what constitutes a final, state-court verdict are entitled to respect. And on the question of when is a verdict issued, the states face a variety of factors that they may elect to weigh differently, for example: (1) whether the verdict must be in writing; (2) whether there is a requirement of a formal public declaration from the foreperson; (3) whether the other jurors must formally assent to the verdict, and whether they must be asked individually or whether asked as a group would suffice; (4) whether there must be an opportunity for polling; and (5) and whether the court may accept a partial verdict for separately charged counts and for lesser-included offenses.

There is no constitutional or practical reason for a single rule to govern all of these questions as long as

the state courts are consistent in determining when a verdict is final and jeopardy has attached, the verdict is given effect. In fact, this Court has acknowledged that there is room for the states to develop law in this area. For example, in *Smith* v. *Massachusetts*, 543 U.S. 462 (2005), this Court noted a double-jeopardy violation when a Massachusetts trial judge directed a verdict on one of several charges, a firearm charge, and then reconsidered this decision and submitted the charge to the jury. The trial court had determined that there was no evidence that a gun barrel was less than 16 inches long, a necessary element of the crime, and directed the verdict on that count. *Smith*, 543 U.S. at 464–65. This Court held that this was a judgment of acquittal to which the bar of jeopardy attached, because this determination was final *as a matter of Massachusetts law*. *Id.* at 471. But this Court made clear that the states are free to create their own rules regarding the finality of a state trial court's decision:

> And of course States can protect themselves still further against the "occasional errors" of law that the dissent thinks "inevitabl[e]" in the course of trial, . . . by rendering midtrial acquittals nonfinal. (Massachusetts, as we have observed, has specifically provided for the correction of mistaken utterances or scrivener's errors, but not for the reconsideration of legal conclusions. . . .)

Smith, 543 U.S. at 474. In other words, the finality of the decision in *Smith* was a matter of state law, and because that law rendered the decision "final," the Double Jeopardy Clause barred further trial proceedings on that issue.

As noted above, the states take different approaches to the process of receiving verdicts. One such difference is the approach to partial verdicts. Compare the Colorado Supreme Court's decision in *Richardson*, 184 P.3d at 763 ("the trial court properly accepted the jury's final verdict and properly refused to poll the jurors with regard to interim votes on the first- and second-degree murder charges") with the Connecticut Supreme Court's decision in *Tate*, 773 A.2d at 326 ("Without the inquiry by the trial court as to whether the jurors had reached a partial verdict on a greater offense, no manifest necessity existed.").

The same is true with respect to polling. The vast majority of states, like the federal courts, allows the parties to poll the other jurors to determine if each juror assents to the announced verdict. LaFave & Scott, Criminal Procedure (3d ed), § 24.9(d), pp 522–523 ("In the great majority of jurisdictions, the jury must be polled upon the request of a party, while elsewhere the matter is left to the discretion of the trial judge."). The states have also reached different conclusions where their procedural rules regarding polling are violated. Compare, e.g., *State* v. *Pare*, 755 A.2d 180, 196 (Conn. 2000) ("we conclude that a violation of a party's timely polling request requires automatic reversal of the judgment"), with *Commonwealth* v. *Dias*, 646 N.E.2d 1065, 1068 (Mass. 1995) (the trial court acted within its discretion in refusing to poll the jury where "[e]ach juror had an opportunity to object to the verdict when it was announced in open court, and no juror objected in a way that we accept as effective.").

Given the complexity and the possible variations, it makes sense to allow the states to establish their own procedural rules to govern the accepting of verdicts. And the rule Arkansas has established—not allowing an inquiry into possible verdicts for lesser-included offenses—a constitutional one.

III. The Constitution does not require state jurisdictions to take partial verdicts.

The United States Constitution is also silent with respect to partial verdicts, and this Court has not specifically addressed them. This Court's analysis in *Price* and *Green* addressed the circumstance in which a jury reached a verdict on lesser-included charges, but did not address the trial court's obligation to inquire into them. That is not the situation presented here.

Blueford argues that where a state creates a system by which the jury only considers a lesser-included offense after it "acquits" on the higher charge ("acquittal first"), there is then an obligation to inquire into and accept partial verdicts. Pet. Br. 23–24 ("the jury's determination must be given final effect"). But as the State of Arkansas explains, Res. Br. 21–29, Arkansas does not fall into the category of "acquittal first" jurisdictions, and therefore this claim is inapposite. Moreover, such a rule should not be imposed, even in genuine "acquittal first" state jurisdictions. Rather, the states should be allowed to confer a greater freedom on a jury in its deliberations, particularly where the Constitution does not require impinging on the jury's exclusive province.

A. The State of Arkansas is not an "acquittal first" jurisdiction.

Blueford relies on the jury instructions that directed the jury to deliberate on the lesser-included offenses only where there was "reasonable doubt" regarding the defendant's guilt on the charge:

> If you have a reasonable doubt of the defendant's guilt on the charge of capital murder, you will consider the charge of murder in the first degree.
>
> * * *
>
> If you have a reasonable doubt of the defendant's guilt on the charge of murder in the first degree, you will then consider the charge of manslaughter.
>
> * * *
>
> If you have a reasonable doubt of the defendant's guilt on the charge of manslaughter, you will then consider the charge of negligent homicide.

J. App. 51–52. Significantly, the instruction does not state that there must be unanimity regarding that decision, does not require the jury to "acquit" or reach a "verdict" before moving on, and does not permanently foreclose the jury from revisiting that decision. Res. Br. 25–26. The contention that the jury's decision to begin discussing a lesser-included charge has the same legal significance as an acquittal ignores the jurisprudence on verdict finality discussed above. For this reason alone, Blueford is wrong in asserting a trial-court duty

to inquire further regarding the foreperson's unofficial statement that the jury was unanimously "against" a finding of capital murder or first-degree murder. J. App. 64, 65.

B. There is no constitutional requirement that juries be forced to issue partial verdicts, even for "acquittal first" jurisdictions.

A majority of states are "reasonable efforts" states, in which a jury may move on to lesser charges after making reasonable efforts to reach a verdict on an original charge. See *State* v. *Davis*, 266 S.W.3d 896, 905–06 (Tenn. 2008) (identifying fourteen states as "reasonable efforts"). The Tennessee Supreme Court has identified eight "acquittal first" jurisdictions in addition to Tennessee (seven states and First Circuit), and listed five "optional approach" jurisdictions (two states and three federal circuits), in which the criminal defendant elects the approach. *Davis*, 266 S.W.2d at 906. There are three reasons why this Court should reject the conclusion that a trial court is required to make further inquiry when a jury is deadlocked, even in acquittal-first jurisdictions.

First, and foremost, the Constitution does not require it. In fact, the reasoning underlying this Court's decisions in *Green* and *Price* contradicts such a rule. The basis of the decisions in these cases is that a verdict on the lesser offense operates as an implied acquittal on the greater charge. *Green*, 398 U.S. at 328 ("the first jury's verdict of guilty on the second-degree murder charge [is] an 'implicit acquittal' on the charge of first-degree murder.").

If Blueford prevails on his claim, however, it is based on the principle that all firm decisions of the jury must be reduced to a verdict. Thus, where the jury announced that it was unanimous on a lesser-included charge, the clear implication of Blueford's position is that the trial court should inquire whether the jurors had all *unanimously* acquitted the criminal defendant on the greater charge. This is the corollary of the principle that a deadlocked jury should be examined to determine whether it really reached a verdict (acquittal) on the greater charge. If a deadlocked jury on the lesser offense requires the court to inquire whether the jury has acquitted on the greater offense, the corollary would apply. A conviction on the lesser offense would require the inquiry into whether the jury acquitted on the greater offense.

The reality is, of course, that jurors often compromise and agree to a lesser offense even where there are jurors who are in fact convinced that the defendant is guilty of the greater charge. This is one of the reasons that some state jurisdictions have opted for the "acquittal first" approach, because it reduces the risk of a compromised verdict. See, e.g., *Davis*, 266 S.W.3d at 907 ("an acquittal-first approach reduces the risk of a compromised verdict"). But it does not eliminate the risk, as evidenced here. Even with an instruction that directed the jury not to move to the next-lesser included offense unless there was reasonable doubt, the trial court inquired whether the jury had deliberated on the negligent homicide offense (the last included offense), even though the foreperson reported a deadlock of 9-to-3 on the manslaughter charge. J. App. 65.

Second, every jury "decision" during deliberations remains entirely provisional until announced as a verdict in a definitive way. Wright's Federal Practice and Procedure, § 516, p. 52 ("A verdict is valid and final when the deliberations are over, the result is announced in open court, and no juror registers dissent."). Rather than capturing a verdict already determined, the inquiry that Blueford advocates would require the jury to do something that it had not yet done: reach a definitive decision on the higher charges that rises to the level of formal verdict.

Blueford contemplates that the instruction directing the jury to disclose a partial verdict would be imposed on a jury that is already deadlocked on a lesser included charge. But as a practical matter, as already noted, there may be jurors who conceded the point of the greater charge as a compromise in an effort to reach a verdict. See *Davis*, 266 S.W.3d at 907. Thus, an instruction to revisit the higher charges, on which the jury had already "unanimously" agreed, may only serve to apply the very kind of pressure that this Court has feared may result in a coerced verdict. For this reason, this Court has acknowledged the "broad discretion" of a trial court to find manifest necessity for a deadlocked jury, allowing it to discharge the jury:

> [I]n this situation there are especially compelling reasons for allowing the trial judge to exercise broad discretion in deciding whether or not "manifest necessity" justifies a discharge of the jury. On the one hand, if he discharges the jury when further deliberations may produce a fair verdict, the defendant is deprived of his "valued right to have his trial

> completed by a particular tribunal." *But if he fails to discharge a jury which is unable to reach a verdict after protracted and exhausting deliberations, there exists a significant risk that a verdict may result from pressures inherent in the situation rather than the considered judgment of all the jurors.*

Arizona v. *Washington*, 434 U.S. 497, 509 (1978) (emphasis added). See also *Renico* v. *Lett*, 130 S. Ct. 1855, 1863 (2010) ("In the absence of such deference, trial judges might otherwise employ coercive means to break the apparent deadlock, thereby creating a significant risk that a verdict may result from pressures inherent in the situation rather than the considered judgment of all the jurors.") (internal quotes omitted). Like the discretion given trial courts, the states should have the leeway to create their own rules on the question whether to require the trial court to inquire further where a jury has identified itself as deadlocked.

Third, this Court should be reluctant to create non-constitutional rules that invade the province of the jury. In rejecting the obligation to have the trial court poll a deadlocked jury on included charges, the Michigan Court of Appeals identified this consideration as the controlling one:

> We conclude that polling the jury on the various possible verdicts submitted to it would constitute an unwarranted and unwise intrusion into the province of the jury. . . . [I]t must be recognized as a practical matter that jury votes on included offenses may be the result of a temporary compromise in an effort

> to reach unanimity. A jury should not be precluded from reconsidering a previous vote on any issue, and the weight of final adjudication should not be given to any jury action that is not returned in a final verdict.

People v. *Hickey*, 303 N.W.2d 19, 21 (Mich. App. 1981). The same reasoning applies here.

The *amici* states do not argue that the decision to inquire as to a partial verdict is constitutionally impermissible, only that the states are in a proper position to make this decision by rule, and that there are a range of acceptable approaches. As noted by the Tennessee Supreme Court in *Davis*, even the federal circuits have a range of practice on the issue of whether to require "acquittal first" approaches or to allow the "optional approach." *Davis*, 266 S.W.2d at 906. Accordingly, this Court should affirm Arkansas' leeway to adopt the approach of its own choosing. This freedom and flexibility should be accorded to the states.

CONCLUSION

This Court should affirm the decision of the Arkansas Supreme Court.

Respectfully submitted,

Bill Schuette
Attorney General

John J. Bursch
Michigan Solicitor General
Counsel of Record
P.O. Box 30212
Lansing, Michigan 48909
BurschJ@michigan.gov
(517) 373-1124

B. Eric Restuccia
Deputy Solicitor General

Katherine Montgomery
Research Assistant

Department of Attorney General
State of Michigan

Attorneys for *Amici Curiae*

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In the Supreme Court of the United States

ALEX BLUEFORD, PETITIONER

v.

STATE OF ARKANSAS

On Writ of Certiorari to the
Supreme Court of Arkansas

BRIEF FOR THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AS *AMICUS CURIAE* SUPPORTING PETITIONER

Jeffrey T. Green
Co-chair, Amicus *Committee*
NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS
1501 K Street, N. W.
Washington, D. C. 20005

Christopher M. Egleson
Counsel of Record
AKIN GUMP STRAUSS HAUER & FELD LLP
One Bryant Park
New York, N. Y. 10036
(212) 872-1039
cegleson@akingump.com

Counsel for Amicus Curiae

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

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TABLE OF CONTENTS

Table of authorities iii

Interest of *amicus curiae* 1

Summary of argument 2

Argument 3

I. When a jury announces only that it is deadlocked on a lesser offense, that counts as an acquittal on each greater offense. 3

A. A conviction on a lesser offense counts as an acquittal on a greater offense, and a deadlock on a lesser offense should have the same effect. 3

B. No formal verdict or judgment was needed to trigger the protections of the Double Jeopardy Clause. 7

II. The Double Jeopardy Clause prevents retrial unless the trial court first inquires whether a deadlocked jury can return a partial verdict—or a defendant waives that inquiry 10

A. The caselaw and common sense support seeking a partial verdict. 11

B. Where the defendant does not object, seeking a partial verdict does not impede the two interests that justify allowing retrial after a mistrial. 15

C. The deference ordinarily accorded to the trial court in declaring a mistrial is categorically inappropriate when the court fails to at least consider seeking a partial verdict before discharging..... 18

Conclusion..... 20

TABLE OF AUTHORITIES

Cases

Allen v. *United States*,
164 U. S. 492 (1896) 16

Arizona v. *Washington*,
434 U. S. 497 (1978) ..... passim

Bullington v. *Missouri*,
451 U. S. 430 (1981) 5

Dealy v. *United States*,
152 U. S. 539 (1894) 5

Downum v. *United States*,
372 U. S. 734 (1963) 12

Ex parte Lange,
85 U. S. 163 (1873) 9

Ex parte Nielsen,
131 U. S. 176 (1889) 5

Green v. *United States*,
355 U. S. 184 (1957) ..... passim

Harris v. *Young*,
607 F.2d 1081 (CA4 1979) 13

Hudson v. *Louisiana*,
450 U. S. 40 (1981) 9

Illinois v. *Somerville*,
410 U. S. 458 (1973) 13

Long v. *Humphrey*,
184 F.3d 758 (CA8 1999) 13

Massachusetts v. *Roth*,
776 N.E.2d 437 (Mass. 2002) 17

Price v. *Georgia*,
398 U. S. 323 (1970) ..... passim

Renico v. *Lett*,
130 S. Ct. 1855 (2010) 19

Selvester v. *United States*,
170 U. S. 262 (1898) 4

Simmons v. *United States*,
142 U. S. 148 (1891) 12

United States v. *Allick*,
274 F. App'x 128 (CA3 2008) (unpub'd) 13

United States v. *Ball*,
163 U. S. 662 (1896) 8, 9

United States v. *Bauman*,
887 F.2d 546 (CA5 1989) 13

United States v. *Byrski*,
854 F.2d 955 (CA7 1988) 13

United States v. *Clark*,
613 F.2d 391 (CA2 1979) 13

United States v. *Gordy*,
526 F.2d 631 (CA5 1976) 14

United States v. *Horn*,
583 F.2d 1124 (CA10 1978) 14

United States v. *Huang*,
960 F.2d 1128 (CA2 1992) 13

United States v. *Jorn*,
400 U. S. 470 (1971) 13

United States v. *Mark*,
284 F. App'x 970 (CA3 2008) (unpub'd) 14

United States v. *Perez*,
9 Wheat. (22 U. S.) 579 (1824) 10, 14

United States v. *Pierce*,
593 F.2d 415 (CA1 1979) 13

United States v. *Salvador*,
740 F.2d 752 (CA9 1984) 14

United States v. *Sanders*,
591 F.2d 1293 (CA9 1979) 13

Wade v. *Hunter*,
336 U. S. 684 (1949) 11, 12

Walck v. *Edmondson*,
472 F.3d 1227 (CA10 2007) 13

Winsor v. *The Queen*,
L.R. 1 Q.B. 289 (1866) 16

Yeager v. *United States*,
129 S. Ct. 2360 (2009)..... 16

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INTEREST OF *AMICUS CURIAE*

Amicus curiae the National Association of Criminal Defense Lawyers (NACDL) is a non-profit association of lawyers who practice criminal law before virtually every state and federal bar in the country.[1] NACDL's more than 12,800 member attorneys and the 35,000 members of its state, local, and international affiliates represent defendants in a wide variety of criminal cases, including in cases that may in-

[1] Counsel of record for the parties have consented to the filing of this brief. Their letters of consent are on file with the Clerk. No party's counsel authored any part of this brief, and no person other than *amicus*, its members, and its counsel made any monetary contribution intended to fund its preparation or submission.

volve the double-jeopardy issue raised in the question presented. NACDL's members are interested in the resolution of the question presented because it will affect the rights of their current and future clients.

SUMMARY OF ARGUMENT

Petitioner said that the death of his girlfriend's son was an accident. The State tried to prove that it was intentional, but the twelve jurors declined to convict on the charges of capital and first-degree murder. The jury instead reported back that it could not agree on whether petitioner committed manslaughter. The court declared a mistrial.

In this brief, *amicus* argues the following. First, this Court's Double Jeopardy Clause cases—in particular, *Green* v. *United States*, 355 U. S. 184 (1957), and *Price* v. *Georgia*, 398 U. S. 323 (1970)—should dispose of the question presented. Those cases hold that when a jury decides to convict on a lesser offense, that constitutes an acquittal on any greater offense, and therefore bars retrial on those greater offenses. A jury's report that it reached and deadlocked on a lesser offense, and its discharge without any report or verdict on any greater offenses, should have the same effect.

Second, the prosecution failed in this case to demonstrate, as it was required to do, that a mistrial was necessary as to any offense but the one on which the jury reported a deadlock. As a result, petitioner may not be retried on those other offenses. The proper course is for the prosecutor to seek to inquire of the jury whether it can return a partial verdict, and for the court generally to make that inquiry unless the defendant objects.

ARGUMENT

I. WHEN A JURY ANNOUNCES ONLY THAT IT IS DEADLOCKED ON A LESSER OFFENSE, THAT COUNTS AS AN ACQUITTAL ON EACH GREATER OFFENSE.

A. A conviction on a lesser offense counts as an acquittal on a greater offense, and a deadlock on a lesser offense should have the same effect.

The question presented is controlled by this Court's decisions in *Green* and *Price*.

In *Green*, as here, the jury was instructed to consider a murder charge as well as lesser included offenses. *Green*, 355 U. S., at 185–186. There, the jury returned no verdict on murder, but all jurors voted to convict on a lesser offense. *Id.*, at 186. That conviction was held to have the effect of an acquittal on the greater charge, preventing retrial on that offense after a successful appeal. *Ibid.* Here, the jury returned no verdict on murder, and the prosecution failed to convince some jurors of guilt on manslaughter, so the jury reported a deadlock on that offense.

The critical parallel between this case and *Green* is that in both cases "the jury was authorized to find" petitioner guilty of either murder or a lesser offense, and declined to convict the defendant of murder. *Id.*, at 189–190. Petitioner "was in direct peril of being convicted and punished for * * * murder at his first trial," and though he "was forced to run the gantlet once on [the murder] charge[s]," the "jury refused to convict him." *Id.*, at 190. In *Green*, "[w]hen given the

choice between finding [the defendant] guilty of either first or second degree murder it chose the latter." *Ibid.* Here, when "given the choice," the jury declined the opportunity to convict on the greater charge and could not agree whether to convict on the lesser.

This parallel between the cases should produce a parallel result. In *Green*, the jury's choice not to convict on the greater charge meant that the defendant's jeopardy on the greater charge had ended, because "the jury was dismissed without returning any express verdict on [the greater] charge" even though "it was given a full opportunity to return a verdict and no extraordinary circumstances appeared which prevented it from doing so." *Id.*, at 191. The same is true here, and so the same result is required.

Price, which reaffirmed *Green*, also requires that same result. As *Price* explained, the Court "has consistently refused to rule that jeopardy for an offense continues after an acquittal." *Price*, 398 U. S., at 329. The Court there recognized no distinction between an "express" acquittal and one that was "implied by a conviction on a lesser included offense," as long as in the latter circumstance the jury had "a full opportunity to return a verdict on the greater charge." *Ibid.* Thus *Price*, like *Green*, bars a second murder trial here because the jury had the same "full opportunity" to convict on the murder charges, but did not do so.

Other cases are consistent and thus reinforce the point. *Selvester* v. *United States*, 170 U. S. 262 (1898), for example, prefigured *Green* and *Price* in explaining that "[d]oubtless, where a jury, although convicting as to some, are silent as to other, counts in an indictment, and are discharged without the consent of the accused * * * the effect of the discharge is

'equivalent to acquittal,' because, as the record affords no adequate legal cause for the discharge of the jury, any further attempt to prosecute would amount to a second jeopardy, as to the charge with reference to which the jury has been silent." *Id.*, at 269. So did *Dealy* v. *United States*, 152 U. S. 539 (1894), in the passage *Selevester* quoted: where a jury has omitted to return a verdict on one of the counts in the indictment, "the discharge of the jury under the circumstances was doubtless equivalent to a verdict of not guilty as to that count." *Id.*, at 542. See also *Ex parte Nielsen*, 131 U. S. 176, 190 (1889) ("If a conviction might have been had, and was not, there was an implied acquittal."); *Bullington* v. *Missouri*, 451 U. S. 430, 445 (1981) (imposition of life sentence signifies that "the jury has already acquitted the defendant of whatever was necessary to impose the death sentence").

It is not important to this logic that in this case the court happened to inquire of the jury whether it had voted on any other offenses, and that the jury reported that it was unanimous to acquit as to murder. Pet. Br. 9–10; Pet. App. 9a & 19a–20a. That surely does present a strong ground for reversing. See Pet. Br. § I. But a defendant's liberty should not turn on whether the court happens to be curious about the jury's votes, and *Green* and *Price* require reversal on broader grounds.

Because the jury was instructed not to consider a lesser offense before reaching unanimity on a greater, the fact that the jury reached the lesser offense of manslaughter demonstrates on its own (without the jury having to say it) that the jury had voted to acquit on the greater murder charges. Thus, where a jury is

given a "hard-transition" instruction, a report of a deadlock on a lesser charge is the strongest of evidence of an acquittal on a greater charge. Just as in *Green*, where the Court concluded that the "assumption" was "legitimate" that the "jury for one reason or another acquitted Green of murder in the first degree" (*Green*, 355 U. S., at 191), in a case like this the hard-transition instruction justifies the conclusion that when a jury reports a deadlock on a lesser offense it has "for one reason or another acquitted" the defendant of any greater offenses.

But *Green* goes farther, for it makes no distinction based on the order in which the jury was instructed to consider any offenses. The Court held in *Green* that it "need not rest alone" on the "assumption" that the jury in fact voted to acquit on the greater charge, because by operation of law the jury's failure to return a verdict on the greater offense terminated jeopardy as to that offense. *Id.*, at 191–192. As the Court explained, the jury was "given a full opportunity to return a verdict [on the greater charge] and no extraordinary circumstances appeared which prevented it from doing so." *Id.*, at 191. Therefore it was "clear" that "under established principles of former jeopardy" the defendant's "jeopardy for first degree murder came to an end when the jury was discharged so that he could not be retried for that offense." *Ibid.* The same is true in any case where the jury announces a deadlock as to a lesser offense. When that jury has neither reported a deadlock as to any greater offense, nor returned a verdict as to any such offense, the same "established principles of former jeopardy" preclude retrial on any such offense.

Moreover, the rule of the court below, if sustained, would create an anomaly in the law. As *Green* and *Price* hold, a jury's decision to convict on a lesser offense counts as an acquittal on any greater offense. In that situation, the state has convinced every member of a jury to vote for guilt on the lesser charge, and in truth there is no indication whether the jury was unanimous to acquit on the greater charge or whether the vote was split. Even so the lesser-offense conviction registers as an acquittal on the greater offense.

The guilt of a defendant in the situation of petitioner is more dubious, and so if anything his position should be stronger and better protected by the Clause. The prosecution in a deadlock case like this one has failed to obtain even the unanimous lesser-offense conviction that it succeeded in obtaining in *Green* and *Price*. The government in a case like this one has thus made a weaker showing of guilt on its first attempt to convict, so it would be anomalous to hold that a defendant like petitioner is less protected on retrial.

That anomaly should be avoided. If the defendant in the *Green* and *Price* scenario gets the benefit of the jury's decision not to convict on a greater offense, a defendant in a case like this one should get that benefit.

B. No formal verdict or judgment was needed to trigger the protections of the Double Jeopardy Clause.

It is no answer here that no verdict was formally received by the court on the greater offenses. That is not part of the analysis under *Green* and *Price*: to the

contrary, those cases address the precise question of how to treat a charge as to which there has been no formal verdict. *Green*'s second and "broad[er]" ground (*Price*, 398 U. S., at 329)—that discharge without a verdict and without justification operates as an acquittal—operates as a matter of law. Just what the jury said or did not say is not relevant to that analysis unless it goes to whether a mistrial was justified.

Second, based on *Green*'s first ground, the question is whether a jury's treatment of a lesser offense implies that it acquitted on the greater, and there the substance of what the jury did is what matters. What the jury did here, by stating that it was deadlocked but only so stating as to a lesser offense, was show that despite having had a "full and fair opportunity to present his evidence to an impartial jury" (*Arizona* v. *Washington*, 434 U. S. 497, 505 (1978)), the prosecutor had failed to convince a single juror that petitioner had meant to kill. If the jury had been deadlocked (or had voted to convict) on a greater offense, that would have been the headline in its report to the trial court. That there was no formal verdict entered has no bearing on that analysis.

This Court has never let courtroom formalities interfere with the "deeply ingrained" (*Green*, 355 U. S., at 187) protection against multiple trials. As noted, a verdict of acquittal bars retrial "even when 'not followed by any judgment.'" *Id.*, at 188 (quoting *United States* v. *Ball*, 163 U. S. 662, 671 (1896)). *Ball* is an important example of how the substance of what a jury decides controls over court formalities, for there the Court recognized that the defendant's judgment of acquittal was invalid (for having been entered on a

Sunday) but the verdict of acquittal still gave the defendant full protection against retrial. Moreover, "it is not even essential that a verdict of guilt or innocence be returned for a defendant to have once been placed in jeopardy so as to bar a second trial." *Green*, 355 U. S., at 188. Indeed, as *Ball* observed in passing, "the reception of the verdict * * * is but a ministerial act." *Ball*, 163 U. S., at 671.

Ex parte Lange, 85 U. S. 163 (1873), further demonstrates the proposition that the question whether jeopardy has terminated is a function of the Double Jeopardy Clause—that is, of federal constitutional law. The Court there decided that it did not matter for double jeopardy purposes that a court purported to hold a judgment open to amendment during its term and thus considered itself free to edit an earlier imposed sentence when it found an error. *Id.*, at 167–168. Instead, for purposes of the Double Jeopardy Clause, the defendant had been punished a first time for his offense with the imposition of the original sentence, and the sentencing court had no power to impose a second, revised sentence on him. *Id.*, at 174.

Hudson v. *Louisiana*, 450 U. S. 40 (1981), supports the same point. The defendant there was found guilty of first-degree murder by a jury, but on a motion challenging the sufficiency of the evidence, the trial court agreed that that the evidence could not support the verdict. *Id.*, at 41. The problem was that "under Louisiana law" the "only means of challenging the sufficiency of the evidence" was to move for a new trial, so that was the motion the defendant made. *Ibid.* There never was a verdict of acquittal, nor did the trial court enter judgment for the defendant. But be-

cause the trial court decided in substance that the evidence could not sustain a guilty verdict, the Court held the defendant could not be retried. *Id.*, at 43.

The consequence of those decisions, in this case, is that the question whether petitioner was acquitted on the murder charges he faced does not turn on whether the trial court took a verdict or entered judgment, or on whether state law would have allowed the court to do either. The question under the "implicit acquittal" analysis is instead whether there are grounds to conclude that the jury in fact rejected particular charges against a defendant.

II. THE DOUBLE JEOPARDY CLAUSE PREVENTS RETRIAL UNLESS THE TRIAL COURT FIRST INQUIRES WHETHER A DEADLOCKED JURY CAN RETURN A PARTIAL VERDICT—OR A DEFENDANT WAIVES THAT INQUIRY.

This case thus presents an occasion to refine the age-old rule of this Court's double-jeopardy jurisprudence that the Double Jeopardy Clause precludes a trial judge from declaring a mistrial unless "there is a manifest necessity for the act, or the ends of public justice would otherwise be defeated." *United States* v. *Perez*, 9 Wheat. (22 U. S.) 579, 580 (1824). This rule is what *Green* relied on in referring to the lack of "extraordinary circumstances" to justify a discharge. *Green*, 355 U. S., at 191. But despite its age, has never before been applied by this Court in the particular but quite common situation presented here.

Several propositions are settled. First, a criminal defendant can generally be tried only and exactly once for a particular offense. *E.g.*, *Washington*, 434

U. S., at 505. Second, a defendant has a "valued right" to obtain a verdict from the jury first empanelled to try him. *E.g.*, *Wade* v. *Hunter*, 336 U. S. 684, 689 (1949). Third, a court has authority to declare a mistrial and discharge the jury. *E.g.*, *Perez*, 9 Wheat., at 580. But fourth, that discharge ends the government's one opportunity to secure a conviction unless the government satisfies its "heavy burden" of "demonstrat[ing]" a "high degree" of "necessity" for the discharge. *E.g.*, *Washington*, 434 U. S., at 505–506.

The precise and new question here is, what must the government "demonstrate" when it has asked a trial court to submit more than one offense to the jury, and the jury reports back that it cannot agree—but does not say what it cannot agree about. The correct answer under this Court's cases is that in shouldering its "heavy burden" the prosecutor must have the court ask whether the jury can return a verdict on any count. This is also sensible, and does not offend the concerns that underlie the "manifest necessity" exception to the one-trial rule.

A. The caselaw and common sense support seeking a partial verdict.

Three principles from the caselaw support requiring the prosecutor and court to extract any factfinding that can be gotten before discharging a reportedly hung jury.

First, seeking a partial verdict is called for because it minimizes the burden that retrial imposes on a defendant and from which the Double Jeopardy Clause protects him. The Court has recognized that a criminal trial is horrible for the defendant, that being

tried for a greater offense is proportionally worse than being tried for a lesser, and that a defendant has a constitutionally protected interest in securing any acquittal available. As the Court observed based on the facts in *Price*—in an observation equally relevant to the facts here—"[T]o be charged and to be subjected to a second trial for first-degree murder is an ordeal not to be viewed lightly." *Price*, 398 U. S., at 331. And "[t]here is a significant difference to an accused whether he is being tried for murder or manslaughter." *Id.*, at 331 n.10. A defendant therefore has a "valued right" to obtain a verdict from the "particular tribunal" empanelled to try him. *Wade*, 336 U. S., at 689. These facts support receiving as much verdict as possible from the first empanelled jury.

Second, the partial-verdict approach is supported by the common sense rule, which is consistent with the cases, that before ordering the "extraordinary" (*Downum* v. *United States*, 372 U. S. 734, 736 (1963)) remedy of a mistrial, a trial court must satisfy itself that there are not less drastic alternatives. As the leading case holds, the power to declare a mistrial "ought to be used with the greatest caution, under urgent circumstances, and for very plain and obvious causes." *Perez*, 9 Wheat., at 580. Where such an alternative exists and does not threaten the integrity of the proceedings, the need for a mistrial—far from being "plain and obvious," as *Perez* requires (*ibid.*)—is entirely absent. In short, a trial court does not exercise "sound discretion" (*Simmons* v. *United States*, 142 U. S. 148, 153 (1891)) simply by pronouncing a jury hung: it may only "discharge a *genuinely* deadlocked jury" (*Washington*, 434 U. S., at 509, 510 n.28 (emphasis added)).

Thus in *United States* v. *Jorn*, 400 U. S. 470 (1971), the Court held that retrial was barred, with Justice Harlan explaining for the plurality that the trial court should not have discharged the jury without considering available alternatives. The record showed that the court could have and should have considered a continuance that would have allowed the government to address the problem with its witnesses, rather than ordering an immediate discharge. This was not "a scrupulous exercise of judicial discretion." *Jorn*, 400 U. S., at 485 (plurality opinion); see also *Illinois* v. *Somerville*, 410 U. S. 458, 469 (1973) (explaining that the Court held in *Jorn* that "there was no 'manifest necessity' for the mistrial, as opposed to less drastic alternatives"). And the courts of appeals are virtually uniform in holding that whether a trial court considered alternatives is probative of whether the court acted properly in declaring a mistrial.[2] That includes a number of cases in which courts examined the existence of alternatives in deciding specifically whether discharging a reportedly deadlocked jury was proper.[3]

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[2] See, *e.g.*, *United States* v. *Pierce*, 593 F.2d 415, 417 (CA1 1979); *United States* v. *Huang*, 960 F.2d 1128, 1136 (CA2 1992); *United States* v. *Allick*, 274 F. App'x 128, 134–135 (CA3 2008) (unpub'd); *Harris* v. *Young*, 607 F.2d 1081, 1085–1086 & 1085 n.4 (CA4 1979); *United States* v. *Bauman*, 887 F.2d 546, 550 (CA5 1989); *United States* v. *Byrski*, 854 F.2d 955, 962 (CA7 1988); *Long* v. *Humphrey*, 184 F.3d 758, 761 (CA8 1999); *United States* v. *Sanders*, 591 F.2d 1293, 1299 (CA9 1979); *Walck* v. *Edmondson*, 472 F.3d 1227, 1240 (CA10 2007).

[3] See, *e.g.*, *United States* v. *Clark*, 613 F.2d 391, 400 (CA2 1979) (no "reasonable alternatives to ordering of a mistrial"

Thus, a trial court should examine less drastic alternatives than declaring a complete mistrial before taking that ultimate step. And inquiring into whether the jury can deliver a partial verdict is just such a partial solution. A trial court should thus take that step in the course of acting with the "greatest caution." *Perez*, 9 Wheat., at 580.

Third, the fact that this Court's caselaw puts the onus on the government to show the requisite "high degree" of necessity for a mistrial supports requiring the government to initiate the inquiry into whether the jury can return a partial verdict. When a jury returns with a report that it has hung, that surely demonstrates that there is some element of the case that may be retried. See *Perez*, 9 Wheat., at 580. But if it is the government's burden to prove guilt in the first instance, and if it is then the government's burden to show that any mistrial is necessary, the government should also bear the burden to show which aspects of the case cannot be resolved by the empanelled jury.

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where jury was deadlocked); *United States* v. *Mark*, 284 F. App'x 970, 973 (CA3 2008) (unpub'd) ("[f]actors to be considered include * * * the judge's prudent consideration of reasonable alternatives"); *United States* v. *Gordy*, 526 F.2d 631, 636–637 (CA5 1976) (court should consider questioning jurors or encouraging further deliberations); *United States* v. *Salvador*, 740 F.2d 752, 755 (CA9 1984) (questioning jurors individually would have been futile and potentially coercive, and there was "no other reasonable alternative" to a mistrial); *United States* v. *Horn*, 583 F.2d 1124 (CA10 1978) (mistrial not justified where judge failed to ask jury whether it would be unable to reach a verdict).

* * *

Under *Perez*, a government that has taken its "one complete opportunity" (*Washington*, 434 U. S., at 509) to convince a jury of guilt, but which has failed, does get a mulligan. But given how extreme and burdensome a deviation from the one-trial rule this chance for a do-over is, it should be limited to the actual questions on which the jury has failed to agree, and not extend to those issues on which it has or may reach a unanimous conclusion. The government, with the aid of the trial court, should just ask which is which.

B. Where the defendant does not object, seeking a partial verdict does not impede the two interests that justify allowing retrial after a mistrial.

Requiring the government to ask the court to receive a partial verdict also squares with the rationales for allowing retrial after a deadlock and consequent discharge of the jury. As the Court recognized in *Washington*, the exception to the one-trial rule that is permitted in such cases is based on two interests: the public interest in "giving the prosecution one complete opportunity to convict those who have violated its laws," and the public interest in ensuring "just judgments" by avoiding coercion of juries. *Washington*, 434 U. S., at 509–510. Requiring a partial-verdict inquiry does nothing to impede either interest.

As to the first, if the jury has in fact ruled out a conviction on any charge, the government has had its one opportunity to convict and has simply failed to carry its burden. The government loses nothing to

which it is entitled by the court taking a partial verdict as to that charge.

As to the second, the stated concern is that a jury will succumb to perceived pressure from the trial judge to reach a verdict, and that jurors will change their votes based on a desire to produce a verdict rather than based on their own assessments of the evidence. That hypothetical concern may have some force in the dire (though imaginary) situation to which one English court alluded in justifying the "necessity" exception, in which jurors might be held "till death" in order to extract a verdict. See *Winsor* v. *The Queen*, L.R. 1 Q.B. 289, 390 (1866) (quoted in *Washington*, 434 U. S., at 506 n.21). In the face of that concern about imposing undue pressure, allowing a mistrial is an important safety valve.

But whatever concern about undue pressure seeking a partial verdict may raise, that concern is outweighed by the defendant's important rights under the Double Jeopardy Clause. The question to the jury may often be answered—as the court's questions were here—by the jury foreperson without need for further deliberation, and in such cases the concern about undue pressure is minimal. In cases where the jury must retire before responding, the request is still unlikely to be more burdensome than the *Allen* charge that this Court approved in the nineteenth century and which is in daily use in courts throughout the country. See *Allen* v. *United States*, 164 U. S. 492, 501–502 (1896); see also, *e.g.*, *Yeager* v. *United States*, 129 S. Ct. 2360, 2364 (2009) (noting that trial court gave *Allen* charge). As long as the defendant has no objection to the request for a partial verdict, there

can be little concern about coercion producing an unfair result.

A more complicated picture will emerge in future cases where the defendant waives his right to the partial-verdict inquiry or objects to the request for a partial verdict. The partial-verdict inquiry is constitutionally required to protect the government's right to retry a defendant as to any offenses on which the jury actually is deadlocked. It follows that as far as the Constitution is concerned, the defendant can choose not to insist on the inquiry. In some mistrial cases where the government proposes to seek a partial verdict, a defendant might indicate that he would accept retrial in full. In such a case, there would be no constitutional need for the court to seek a partial verdict. In some cases the defendant might decline to waive his right to the inquiry but object to the charge nonetheless.[4] The range of factual circumstances in

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[4] A defendant's objection to a partial verdict inquiry in a "soft transition" case would be particularly significant. There may be some concern about coercion in such cases, where the jury's deliberations are not structured by the instruction and so the jury may not complete deliberations on greater offenses before considering the lesser offense on which it ultimately reports a deadlock. Therefore, as one court in a soft-transition jurisdiction has worried, seeking a partial verdict could "invite[] a report that may be based on only preliminary, tentative deliberations (if any) on that level of offense, or hasty resumption of deliberations concerning that level of offense in an effort to satisfy the judge's apparent desire for a decision." See *Massachusetts* v. *Roth*, 776 N.E.2d 437, 449 (Mass. 2002). The concern is less in a hard-transition case: "the taking of a partial verdict" in such a case "poses fewer problems than would be encountered" in a soft-transition case because the hard-transition instruction "re-

which the government seeks a partial verdict and the defendant objects demand to be addressed as they arise. The proper action for the court to take in such cases, and the consequences for the double-jeopardy analysis, should not be resolved on these facts, where no partial inquiry was proposed and the defendant consequently took no position on whether such an inquiry should proceed.

C. The deference ordinarily accorded to the trial court in declaring a mistrial is categorically inappropriate when the court fails to at least consider seeking a partial verdict before discharging.

Notwithstanding that a trial court's decision to declare a mistrial is generally given deference, that deference is categorically inappropriate in a case like this one. A trial court must earn the deference of a reviewing court by making a considered judgment that takes all relevant factors into account: "[r]eviewing courts have an obligation to satisfy themselves that * * * the trial judge exercised 'sound discretion' in declaring a mistrial." *Washington*, 434 U. S., at 514 (quoting *Perez*, 9 Wheat., at 580). The problem here is that there was no evident consideration by the trial court of whether a less drastic alternative like seeking a partial verdict was called for in order to limit the hazards and burdens that multiple trials would impose on petitioner. In such a circums-

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quires the jury to reach a genuine 'verdict' on the offense as charged before considering any other level of offense." *Id.*, at 449 n.14.

tance, "the reason for * * * deference by an appellate court disappears." *Washington*, 434 U. S., at 510 n.28.

In other words, a trial judge cannot satisfy his obligation to exercise sound discretion simply by pronouncing a jury hung. Appellate courts do not grant "absolute deference to trial judges" who declare mistrials on the basis of hung juries; rather, the exercise of discretion must be sound and related to the public interest in securing a just result. *Renico* v. *Lett*, 130 S. Ct. 1855, 1863 (2010).

No doubt there are cases in which, based on facts with which the trial is more "conversant" than "any reviewing court can possibly be" (*Washington*, 434 U. S., at 514), the trial court could perceive some risk in seeking a partial verdict. In such a case, notwithstanding the relatively modest nature of the inquiry proposed here, deference would be appropriate if the Court declined the government's request to seek a partial verdict. That conclusion is required (and is all that is required) by this Court's admonition that cases of mistrial "turn on the particular facts and thus escape meaningful categorization." *Somerville*, 410 U. S., at 464.

But what categorically does not deserve deference is a trial court's decision to enter a mistrial without any consideration for whether the burden that declaration would impose on the defendant is justified or whether less burdensome alternatives are available. Here, reducing that burden only required asking whether the jury could return a partial verdict.

* * *

Based on the foregoing, the prosecution's failure to seek an inquiry into whether the jury would return a

partial verdict means that the government did not demonstrate the need for a mistrial on all offenses. The government therefore has no more right to try petitioner for murder.

CONCLUSION

The judgment of the Supreme Court of Arkansas should be reversed.

Respectfully submitted,

Christopher M. Egleson
Counsel of Record
AKIN GUMP STRAUSS
HAUER & FELD LLP
One Bryant Park
New York, N. Y. 10036
(212) 872-1039
cegleson@akingump.com

Jeffrey T. Green
Co-chair, Amicus
Committee
NATIONAL ASSOCIATION OF
CRIMINAL DEFENSE
LAWYERS
1501 K Street, N. W.
Washington, D. C. 20005

Counsel for
Amicus Curiae

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